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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI — EASTERN DIVISION

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI — EASTERN DIVISION

JURISDICTIONAL STATEMENT

This appeal is filed on behalf of Chicago, Rock Island & Pacific R. Co., Chicago, Burlington & Quincy R. Co., Chicago, Milwaukee, St. Paul and Pacific R. Co., The Kansas City Southern Ry. Co., Missouri-Kansas-Texas R. Co., Missouri Pacific R. Co., St. Louis Southwestern Ry. Co., The Atchison, Topeka and Santa Fe Ry. Co., Southern Pacific Co., and The Texas and Pacific Ry. Co.

OPINIONS BELOW

The Memorandum Opinion of the three-judge United States District Court for the Eastern District of Missouri,

Eastern Division, reported at 233 F.Supp. 381, is set forth in Appendix B to this Statement, and Appendix C is a copy of the judgment. The Interstate Commerce Commission's report, 316 I.C.C. 759, is attached. The I.C.C. order dated July 6, 1962 served with that report is reprinted in Appendix D to this Statement. Appendix E is a copy of the Commission's "Corrected Order", dated January 30, 1963, and served February 25, 1963, wherein petitions for reconsideration were denied, except that the ultimate findings on page 774 of I.C.C. volume No. 316, were revised as indicated in Appendix E.

JURISDICTION

This action was brought under 28 U.S.C. 1336, 1398, 2284, 2321-2325, inclusive, 5 U.S.C. 1009 and 49 U.S.C. 17(9), to set aside the Interstate Commerce Commission's report and orders.

The action before the District Court was dismissed by Judgment entered August 31, 1964. Notice of Appeal to the Supreme Court was filed in the District Court for the Eastern District of Missouri by the appellant railroads on October 22, 1964.

Jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b), and the following decisions sustain the jurisdiction of the Supreme Court to review the judgment of the three-judge District Court on direct appeal in this case: *Thompson* v. *United States*, 343 U.S. 549, and *United States, et al.* v. *Great Northern Ry. Co.*, 343 U.S. 562.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Section 1 of the Interstate Commerce Act, and sections 2, 3(4), 303(b) and (c) of the Interstate Commerce Act, 49

U.S.C. 2, 3(4) and 903(b) and (c), are set forth in Appendix A.

QUESTIONS PRESENTED

1. Did the Commission misconstrue Section 3(4) of the Interstate Commerce Act in prescribing ex-barge rail rates on grain brought to Mississippi River ports by water in barge movements excluded from regulation under part III of the Interstate Commerce Act and subject to transportation rates and charges that are unpublished and unregulated by the Commission?

2. Was the Commission's error here ameliorated in any way by its reference to Section 2 of the Interstate Commerce Act where no shipper testified on this record or adduced any evidence here of competitive disadvantage or discrimination suffered by paying published rail rates as compared with divisions, beyond such ports?

3. Whether the Commission's interpretation of the Interstate Commerce Act and order based thereon result in an unconstitutional application of the statute?

4. Is not the Commission's finding that rail rates on ex-barge grain are discriminatory to the extent they exceed divisions of joint all-rail rates, contrary to law, particularly when the evidence established, among other things, that outbound railroads' divisions from Memphis and New Orleans to Arkansas and Louisiana do not cover any origination service, whether grain is transited or not, whereas the prescribed ex-barge rates must embrace, in addition, a complete rail origination service?

STATEMENT

Pursuant to the remand in *Arrow Transportation Co.* v. *United States*, 176 F.Supp. 411 (affirmed *per curiam*, *State*

Corporation Comm. of Kansas v. *Arrow Transportation Co.*, 361 U.S. 353), the I.C.C. reopened its docket No. 30744 for further hearing to receive evidence of divisions received by railroads from barge unloading ports, including Memphis, Tenn. and New Orleans, La., on ex-rail grain traffic and

> "evidence relevant to whether and to what extent such divisions should determine the rail rates from such ports on ex-barge traffic."

Hearings were held, briefs were filed, the Hearing Examiner issued a Recommended Report, Exceptions and Replies thereto were filed, the entire Commission heard oral argument, and the Commission's report and order were served in July 1962. Upon consideration of Petitions for Reconsideration and Replies thereto, the Commission issued the "Corrected Order" in Appendix E, which denied the petitions, but modified the ultimate findings in the report.

Revision of the ultimate findings in the "Corrected Order" preserved the breakdown in the report whereby finding number one (1.) pertains to Mississippi River ports and finding number two (2.) relates to Tennessee River ports. None of the appellants serve the latter ports. This appeal was and is taken only to have finding number one (1.) set aside, and nothing said herein is intended to enlarge the scope of this appeal to embrace or attack finding number two (2.)

Finding number one (1.) reads as follows:

> "That on grain and grain products hauled by for-hire barge to the Mississippi River ports of Memphis, Tenn., Greenville and Natchez, Miss., and New Orleans and Baton Rouge, La., and moved by rail from those ports to points in southern territory or to points in Arkansas and in Louisiana west of the river, rates for the rail movement of such traffic from the ports are and

> for the future will be discriminatory against connecting common carriers by water subject to part III, and unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation, to the extent that those rates exceed the contemporary rates or the lowest divisions received by the respective rail lines, over which the ex-barge traffic moves, out of joint all-rail rates applicable on grain and grain products from the same origin territory through those ports to the same destinations."

Ex-barge rates higher than the lowest ex-rail divisions over the respective rail routes from the Mississippi River barge unloading ports are therein found (a) "discriminatory against connecting common carriers by water subject to part III" (Section 3(4) of the Interstate Commerce Act) and (b) "unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation" (Section 2 of the Act).

The shipper-discrimination finding under section 2 of the act has a broader application than the connecting-carrier, section 3(4) finding, because it covers grain brought to the ports by for-hire barges operating completely under the exemption from regulation found in sections 303(b) and (c) of the Interstate Commerce Act. See Appendix A.

Moreover, as a practical matter, the Commission's section 3(4) finding requires establishment of ex-barge rail rates on grain moved by certificated water carriers under the section 303(b) exemption, because in the penultimate paragraph of the report, 316 I.C.C. 759, 775, the railroads are precluded from confining application of the prescribed ex-barge rail rates to regulated water traffic. No conditions, except an origin restriction, may be imposed.

Section 3(4) provides that "any common carrier by water subject to part III" is a "connecting line" protected from

rate discrimination. When transporting bulk grain under the exemption of Section 303(b) of the act, a common carrier is not subject to part III. However, the Commission attempted to justify its ultimate findings with an unwarranted subordinate conclusion that "exempt transportation was included in the *Mechling, Blue Line,* and *Dixie Carriers* cases, and no distinction was made in the *Arrow* case." 316 I.C.C. 759, 774. In *I.C.C.* v. *Mechling,* 330 U.S. 567, and *Arrow* cases, primary reliance was placed upon the National Transportation Policy declaration.

> "• • • for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each;" (underlining added).

Exempt transport under Sections 303(b) and (c) is not "subject to the provisions" of the Interstate Commerce Act.

Inasmuch as the decision in *Dixie Carriers* v. *U. S.,* 351 U.S. 56, was based upon Sections 3(4) and 307(d) of the Act, it must be presumed that only regulated traffic was considered.

The fact that no express distinction was made in those cases between regulated and unregulated traffic does not resolve the issue, or set a precedent. When part III of the Act was proposed to Congress, regulation of all common carriers by water was recommended, but Congress exempted transportation of commodities in bulk on the conditions stated in Sections 303(b) and (c) of the Act, and through-route protection was restricted to carriers subject to economic regulation. *Conference Report on S. 2009,* H. Rep. 2016, 76th Cong. 3d Sess. (Sec. 9(b) of S. 2009) at page 10.

In *James McWilliams Blue Line* v. *United States,* 100 F.Supp. 66, the holding was based on a Section 2 violation

on regulated rail movements from Kentucky and West Virginia coal mines to Hampton Roads, Va. A rate difference for that service was based upon a remote circumstance, namely, whether after an exempt intracoastal water haul from Hampton Roads to a storage stockpile at New Haven, a subsequent intrastate move was made by a regulated rail carrier or an exempt water carrier. In the *Blue Line* case, as in the *Mechling* case in respect of shippers of ex-barge grain as compared with shippers of ex-lake grain, there was shipper evidence of imposition of higher rates for one shipper than for another shipper for

> " * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, * * *"

In other words, the evidence in both cases supported a conventional finding that Section 2 was violated, and the remote circumstance in the *Blue Line* case did not undermine the prerequisites for finding a violation of Section 2 on rail movements from the mines to the Virginia port.

Nonetheless, in the instant case, there is no evidence on the record of a Section 2 violation. No shipper of ex-barge grains at Memphis or New Orleans to Arkansas and Louisiana has adduced evidence that a competitor is advantaged by the lowest divisions of joint all-rail rates, nor could such proof be made because shippers have no interest in divisions, do not pay charges based on divisions and do not know the amounts of divisions. In short, this case is distinguishable from both the *Mechling* and *Blue Line* cases on the Section 2 issue, because in those cases there was shipper evidence to support findings that Section 2 was violated, but there is no such evidence in respect of divisions on the record in I.C.C. docket Number 30744. Accordingly, the Section 2 finding is not supported by substantial evidence on the record.

It must also be concluded that none of the cases cited by the Commission are precedents for the proposition that the Interstate Commerce Act, including the National Transportation Policy, provides for protection of traffic exempt from regulation. If the Act were so construed, it would violate the equal protection principle implicit in the Due Process required by the Fifth Amendment to the Constitution, for the reason that it would unfairly handicap regulated carriers in their competition with unregulated carriers, which, in recent years, have been expanding operations and tonnage handled at alarming rates of increase to the detriment of the regulated modes of transportation. Unregulated carriers have an unfair advantage over regulated carriers in respect of quotation of transportation charges. The Interstate Commerce Commission recognized this situation over 50 years ago. *The Matter of Jurisdiction Over Water Carriers,* 15 I.C.C. 205, 209.

Turning to the question of the applicability of the Section 3(4) finding in respect of discrimination against water carriers transporting grain subject to regulation under part III of the Act, it has been continuously asserted, and with overwhelming support in the evidence, that the lowest division, an average of divisions, or any division could not be the exact measure of discrimination, because from Memphis and New Orleans to Arkansas and Louisiana points west of the Mississippi River, the service provided by outbound railroads to earn the pertinent divisions on ex-rail traffic starts from the interchange yards of the outbound carriers. On ex-rail traffic, the inbound railroads deliver loaded cars to the outbound carriers' interchange yards at those ports, whether the grain or grain products are transited at those ports or not. The inbound carriers in consideration of their respective divisions, perform the complete transit service at Memphis and New Orleans, including provision of an empty car for loading, if neces-

sary, and the intraterminal switch from the transit facilities to the outbound carriers' yards.

The ex-barge rates prescribed by the Commission on the basis of the lowest divisions require a complete origination service by the outbound line, directly if possible, or indirectly by absorption of switching charges and car costs for the terminal services of other railroads. This origination service is in addition to the service provided to earn outbound divisions, and it includes gathering empty cars, switching empty cars to barge docks, car costs augmented by two-days' free time for loading, and switching the loaded cars to the terminal yard of an outbound railroad. Inasmuch as the Commission's order does not permit imposition of conditions to application of the prescribed ex-barge rates, in many instances the divisions are compensatory for service rendered on ex-rail traffic, but would be noncompensatory for ex-barge traffic on account of the extra origination service required.

A cost study based on the Commission's conventional rail cost formula for rail movements from Memphis to Arkansas points, and a similar study supplemented by special studies for rail handling from New Orleans to Louisiana points, were submitted in evidence by these appellants. Without any explanation whatsoever, the Commission made a summary disposition in the second full paragraph on page 770 of I.C.C. volume 316, which treatment does not comply with the requirements of Section 8(b) of the Administrative Procedure Act. See the dissent of Mr. Justice Black in *Chicago & Eastern Illinois R.* v. *United States,* 84 S.Ct. 224.

Furthermore, the terminal switching charges at Memphis and New Orleans are on the record. If the Commission had prescribed ex-barge rates on the basis of divisions plus terminal switching charges, the differences in service,

ex-barge as compared with ex-rail, would have been recognized and reconciled. This approach would have complied with the law of the *Mechling* case, that rate differences, ex-barge and ex-rail, must be justified by cost of service. Switching charges were found not in excess of cost of service in *Increased Switching Charges at Memphis, Tenn.*, 308 I.C.C. 5, 17.

From Memphis or New Orleans to the same Arkansas or Louisiana destination, multiple and variable divisions were shown. For example, from Memphis to Camden, Ark., 16 divisions, ranging from 10.6 to 38.5 cents were shown to be applicable. The Commission does not explain why the lowest division should be the unit of measure. Compare *Gilbertville Trucking Co., Inc. v. United States*, 83 S.Ct. 217.

Movement studies on the record revealed that the rail transportation of grain and grain products from Memphis and New Orleans to Arkansas and Louisiana were comprised almost entirely of animal and poultry feed. The total quantity of any one grain ingredient, which could be moved by barge, such as wheat, corn, oats, etc., moved in the entire year of 1959 from either port, in relation to barge-load minima, was so small that a serious question of whether there was any discrimination in fact was presented, but the Commission did not deal with this issue.

Since the feed shipments concerned contain other ingredients as well as grain and grain products, the several rates applicable to the separate commodities in the mixtures, produced average earnings per 100 pounds for outbound railroads that were greater than the lowest divisions on grains. The average earnings per 100 pounds for the 1959 feed shipments are shown in exhibits received in evidence. These average earnings of the outbound carriers meet the "compensation received" test as a "yardstick for measuring

discrimination" pronounced by the Court in the *Arrow* case, 176 F.Supp. 411, 419, however, the Commission arbitrarily prescribed ex-barge rates on a parity with the lowest divisions.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the Supreme Court in the *Mechling* case, 330 U.S. 567, 577, requires the Commission to "preserve intact the inherent advantages of cheaper water transportation", however, the Commission's order assailed herein goes beyond the Court's holding that ex-barge and ex-rail traffic be treated equally ratewise and compels the railroads outbound west from Memphis and New Orleans to, in effect, provide a free rail origination service on ex-barge grain, since the ex-rail divisions used as maxima for the prescribed ex-barge rates only cover rail movement of loaded cars from the yards of said outbound railroads. Thus, the Commission's prescription is premised on a misapplication of the law of the *Mechling* case. In these circumstances, only the Supreme Court can compel the corrective action necessary to bring about a just and equitable co-ordination of inter-modal transportation service in interstate commerce.

Decisions below rest on unwarranted inferences that the *Mechling* case directs the Commission to regulate carriers subject to the Interstate Commerce Act in a way that will promote the flow of traffic in unregulated channels. However, study of the authorities cited does not reveal that the Supreme Court has considered the statutory and constitutional questions concerned. Because of the continuing gradual diversion of traffic from regulated to unregulated carriage, resolution of the problem is timely, and there is an adequate record in this case for a decision.

CONCLUSION

The questions presented are of substantial public importance. It is respectfully submitted that plenary consideration is required, with briefs and oral argument.

Respectfully submitted,

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APPENDIX A

Statutes Involved

National Transportation Policy

(September 18, 1940.) (49 U.S.C., preceding §§ 1, 301, 901, and 1001.) It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Shipper Discrimination

Sec. 2. (As amended February 28, 1920, June 19, 1934, and August 9, 1935.) (49 U.S.C., § 2.) That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any

service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Connecting-Carrier Discrimination

Sec. 3. (As amended February 28, 1920, March 4, 1927, August 9, 1935, August 12, 1935, September 18, 1940, August 2, 1949). (49 U.S.C. § 3.)

(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Exemptions

Sec. 303. (September 18, 1940, amended, June 12, 1948.) (49 U.S.C., § 903.)

(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are

transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1939, as amended.

(c) Nothing in this part shall apply to transportation by a contract carrier by water of commodities in bulk in a non-ocean-going vessel on a normal voyage during which (1) the cargo space of such vessel is used for the carrying of not more than three such commodities, and (2) such vessel passes within or through waters which are made international for navigation purposes by any treaty to which the United States is a party.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHICAGO, ROCK ISLAND, & PACIFIC R. CO., et al., Plaintiffs, v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	No. 63 C 145 (3)

MEMORANDUM OPINION

Before Matthes, Circuit Judge, and Harper and Regan, District Judges.

Regan, District Judge.

This action is brought to enjoin, set aside, suspend and annul the Interstate Commerce Commission's Report and Order dated July 6, 1962, as amended by a Corrected Order dated January 30, 1963, and served February 25, 1963. The Commission, in those orders, found that railroad rates on grain and grain products for outbound shipment from certain river ports to inland destinations, which gain had previously been transported by for-hire barges, were discriminatory and in violation of sections 2 and 3(4) of the Interstate Commerce Act, 49 U.S.C. §§ 2, 3 (4).

The controversy has a long history. The original complaint before the Commission filed January 4, 1951, by three water carriers (all intervening defendants herein)

alleged that the railroads serving southern, southwestern and western trunkline territories charged discriminatory rates on shipments of grain and grain products previously transported by the complaining barge lines on the movements from transhipping ports on the Mississippi, Missouri, Ohio and Tennessee Rivers to inland destinations. The rates established on ex-barge shipments, until changed by the Commission's orders, were flat-rates or stated rates from a named origin (or port) to a named destination. The rate was not dependent on the prior or subsequent transportation. On the other hand, the railroads maintained rates over all-rail routes, some hauls based on a combination of factors and others on single factor rates. On ex-rail grain, rates made on a combination of factors provided a published reshipping proportional rate from a port normally lower than the flat rate which applied to ex-barge grain. These lower proportionals applied to ex-rail grain whether or not the grain was stopped at the ports for processing or storage before the outbound shipments. In the instances where a single-factor joint rate applied to all-rail routes through a port, the various railroads performing service from the port to destination, would receive agreed-to divisions which were not published. In almost all instances the divisions from port to destination were substantially lower than the flat-rate level. The division, like the ex-rail published proportional rates, remained the same whether the grain was stopped at the ports for transit, or whether the shipment was continuous.

The water carriers complained that ex-barge rates were discriminatory insofar as they exceeded the proportional rates assessed by the railroads on all-rail shipments from the same ports on the Mississippi, Missouri and Ohio Rivers, and to the extent that the rates exceeded the division of joint-through rail rates through Mississippi and

Tennessee River Ports to points in Southern Classification Territory. The water carriers asserted violations of sections 1, 2, 3(1) and 3(4) of the Interstate Commerce Act. The Commission, in its first report, found that none of the alleged violations had been sustained by the evidence, and denied to the water carriers the right to obtain data relating to the applicable divisions of all-rail joint rates which the plaintiffs sought to compare with the ex-barge rates.

Subsequently, two actions were brought to set aside the Commission's first report: American Barge Line Co. v. United States in this District, and Arrow Transportation Co. v. United States in the Northern District of Alabama. The cases were stayed when the Commission on its own motion reopened the proceedings to review the controversy in the light of Dixie Carriers, Inc. v. United States, 351 U.S. 56, May 4, 1956. In that case the complaining barge lines sought joint barge-rail routes and rates comparable to the all-rail proportional rates. The Commission found that the Dixie Carriers case was distinguishable in that the carriers in that case were willing to assume the expense of transfer of the ladings to rail cars and the tender of the cars to the outbound rail lines. The Commission further found that Dixie Carriers did not answer the controversy regarding the applicability of divisions of all-rail joint rates but was only concerned with a situation involving published rail proportionals.

The next report of the Commission date March 24, 1959, followed an oral reargument on all issues. The Commission reversed its holding as to the alleged unlawfulness of the ex-barge rates compared with the proportional rates on all-rail movements. The Commission held that under Mechling [Interstate Commerce Commission v. Mechling 330 U.S. 567 (1947)] and Dixie Carriers, supra, cases that section 3(4) required that no higher rate could apply to ex-barge

traffic from a river port than that applicable to ex-rail traffic from that port where there was no significant difference in the service beyond that port. In so holding, the Commission determined that the barge and rail carriers were "connecting carriers" under Section 3(4). The action of the Commission was sustained in Atchison, T. & S.F. Ry. Co. v. United States, 194 F. Supp. 438 (D. Kansas 1961).

In that order, however, the Commission further held that the Mechling and Dixie Carrier Cases had no application to ex-barge rates in comparison to divisions of all-rail joint through rates and decline to reconsider that issue.

Thereafter, Arrow Transportation Company brought suit challenging the Commission's denial of relief where ex-barge rates exceeded the divisions of all-rail rates from Tennessee River ports. In Arrow Transportation Co. v. United States, 176 F. Supp. 411 (N.D. Ala. 1959) the court sustained the position of the water carrier stating at p. 419:

> ". . . In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination. This is not to suggest that the division received by the outbound railroad on ex-rail traffic necessarily established the exact rate at which ex-barge traffic must be handled. We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions received on ex-rail movements are *prima facie* evidence at to what charge should be assessed upon ex-barge movements. The plaintiffs attempted to show the divisions received by the railroads on ex-rail traffic, but the Commission refused to receive the evidence. In this the Commission erred. Dixie Carriers v. United State, supra.

The Court further held, p. 421:

> "When Congress authorized the building of a modern navigable channel in the Tennessee River, it meant for that river to be coordinated with the existing transportation system so as to make its full benefits available to shippers. The Commission has a positive duty to prescribe rates for ex-barge grain which will accomplish that end. Whether the rates are published as proportional rates or as joint rates, the charges paid by the shipper for the movement of ex-barge grain beyond the ports must be on a level which preserves intact the savings on the water leg of the journey, at ports where the inbound and outbound rail carriers are different. The Commission cannot apply the standards applicable to a local movement in determining the reasonableness under section 1 of the ex-barge rates. Likewise, it is prohibited by section 2 from permitting the discrimination between shippers which would result from charging higher rates for the outbound movement to the shipper who receives his inbound grain by barge than apply to the shipper who receives his inbound grain by rail. We construe the Supreme Court decisions' in Mechling and Dixie as making unlawful any rate-making device which deprives barge transportation of its rightful place in the National transportation system or which deprives shippers of any part of the economies resulting from the use of barge transportation. We hold, therefore, that the Commission cannot lawfully approve any system of ex-barge rates on grain which deprives shippers of any of the savings of the inbound barge transportation but must prescribe ex-barge rates which will fully preserve the inherent advantages of such barge transportation.

Acting pursuant to Section 10(8) of the Administrative Procedures Act the Court remanded the case to the Commission with instructions "to enter an order prescribing lawful, reasonable, and non-discriminatory rates on ex-barge traffic from the Tennessee River ports to destinations in the Southeast."

The Court's order issued pursuant to that opinion required the Commission,

> "to order as promptly as possible, the establishment of lawful, reasonable, and non-discriminatory ex-barge rail rates on grain and grain products from the Tennessee River Ports of Decatur, Sheffield, Guntersville, Alabama and Knoxville and Chattanooga, Tennessee, to destinations in Southern Classification Territory."

Upon rehearing pursuant to the opinion and order of the District Court, Northern District of Alabama, the Commission received further evidence including representative schedules of division of the all-rail through rates through the ports in question. The ultimate findings and conclusions are set out in the order of the Commission dated January 30, 1963, served February 25, 1963. The finding of the Commission under attack in this case reads as follows:

> "1. That on grain and grain products hauled by for-hire barge to the Mississippi River Ports of Memphis, Tenn., Greenville and Natchez, Miss., and New Orleans and Baton Rouge, La., and moved by rail from those ports to points in southern territory or to points in Arkansas and in Louisiana west of the river, rates for the rail movement of such traffic from the ports are and for the future will be discriminatory against connecting common carriers by water subject to part III, and unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation, to the extent that those rates exceed the contemporary rates or the lowest division received by the respective rail lines, over which the ex-barge traffic moves, out of joint-rail rates applicable on grain and grain products from the same origin territory through those ports to the same destination. . . .
>
> ". . . In instances where the divisions accruing to the rail lines from the ports to the same destination differ

depending upon inbound rail routing, discrimination will exist to the extent that the ex-barge rate is higher than the lowest division over the route of movement."

A similar finding numbered 2 was made regarding traffic hauled by for-hire barge to the Tennessee River ports of Decatur, Florence-Sheffield, Knoxville and Chattanooga and Guntersville, Alabama.

The plaintiffs in this action are railroads affected by the quoted finding. The Southern railroads affected by finding number 2 have not joined in this action. The primary question before this Court is whether the finding of the Commission that the railroad rates in issue applicable upon shipments of grain and grain products previously transported by for-hire barges, were discriminatory, in violation of section 2 and 3(4) of the Interstate Commerce Act, (49 U.S.C. §§ 2 and 3(4) is premised upon a rational basis and supported by the record and sufficient findings by the Commission.

In addition to its general claim of error that the findings and conclusions of the Commission are contrary to law and unsupported by the record, the plaintiffs specifically attack the findings for the following reasons:

1) The Commission finds unjust discrimination against shippers by barge under Section 2 although divisions of the joint-rail rates are not rates paid by shippers but are private agreements for compensation between the participating carriers.

2) The Commission ignores the precedents as to what constitutes "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

3) The Commission's finding of violation of Section 2 is based upon cases which did not involve exempt traffic.

4) The Commission's findings, insofar as they apply to grain transported inbound by exempt carriers, deny to the regulated carriers guarantees of due process and are not within the National Transportation Policy.

5) In their complaint, plaintiffs point out as error by the Commission that the findings are unjustified to the extent they find discrimination on hauls from Greenville or Natchez, Mississippi, or Baton Rouge, Louisiana. There are no authorized joint routes with interchange between carriers at these points and thus, no divisions. The alleged error is not pursued in the briefs and is apparently abandoned.

6) In finding that the lowest divisions are the measurement of discrimination, the Commission sets an illegal standard. The standard set by the Arrow case is "actual compensation", and the evidence established that the lowest divisions are not discriminatory, that the service costs related to divisions are less than service costs on ex-barge hauls, and that the lowest divisions would not be compensatory.

7) The establishment of flat rates to apply from ports on all grain would discriminate against the inbound railroads which provided transit service and tender loaded cars to the outbound rail carrier.

Contentions one and two ignore the decision in the Arrow case. It was the Court not the Commission, which determined that, whether the rates took the form of ex-barge or ex-rail proportionals or as joint rates, the charges paid by the shipper must preserve intact the savings of the water transportation. The Court held that a charge (here a joint-

rail charge) which results in higher rates to the shipper who uses barge traffic to the port for the movement beyond the port than the portion of joint-rail charge received by the carrier for the ex-rail movement beyond the port is in violation of Section 2. It is the outbound movement which brings the comparable ex-barge and ex-rail traffic within the "like and contemporaneous service" test of Section 2. Plaintiff, in effect, assails the conclusions of the Court in the Arrow case which are not under review in this case.

The Court cannot agree with the plaintiffs' reading of the cases relied upon by the Commission in making its order applicable to exempt as well as regulated transportation. I.C.C. v. Mechling, 330 U.S. 567, involved both regulated and exempt barge traffic. No distinction was made by the Court or the Commission in that case. Subsequently, in James McWilliams Blue Line v. United States, 100 F. Supp. 66, aff'd. 342 U.S. 951, the Court specifically rejected the Commission's refusal to entertain the complaint on the ground that the barge traffic was unregulated traffic. In so holding, the Court in the Blue Line case, relied in part upon the Mechling case recognizing that it did not distinguish between regulated and unregulated barge traffic. The Arrow opinion makes no reference to a distinction between unregulated barge traffic and regulated barge traffic but merely directs that the Commission enter an order "prescribing lawful, reasonable and nondiscriminatory rates on ex-barge traffic." Therefore, upon intervention of the Waterways Bulk Transportation Council representing exempt barge interests, the Commission was justified in framing its finding and order broadly to apply to exempt for-hire transportation.

In this regard plaintiffs contend that the application of the Commission's findings to transported grain not subject to rate regulation denies them the guarantees of due process

and the preservation of their inherent advantages under the National Transportation policy. It is certainly apparent that governmental restrictions on rate changes of regulated traffic inhibit the regulated carriers from meeting competition at a compensatory level at the same time it attempts to serve its purpose of preventing "cutthroat competition". In view of the precedents, however, the Commission and this Court are bound to the proposition that a distinction cannot be made between the application of the Commission's orders to regulated and unregulated barge traffic. The suggestion of the railroads that the Commission's restrictions jeopardize their existence is speculative inasmuch as they are free to set the division or rates charged on ex-barge and ex-rail reshipments at a compensatory level.

The plaintiffs next contend that the finding by the Commission that the lowest division measures the discrimination is not in conformity with the compensation test set forth in the Arrow opinion. Reference is made by plaintiffs to the portion of the opinion at page 419 previously quoted herein.

By virtue of the prior decisions, particularly Arrow and Mechling, the Commission was compelled to find discrimination existed to the extent that the division applicable to an ex-rail movement was lower than that assessed on a like ex-barge movement, unless the rail carriers established a cost differential to the outbound carrier which justified a higher ex-barge rate. The Commission found that no cost differential was established, and therefore discrimination existed. The Commission recognized the problem of ascertaining the measurement of the discrimination where the divisions were of such a variable nature because of the many factors involved in determining the division levels. However, the Commission could not be concerned with the

reasonableness of the railroad rate structure where the Courts have prescribed that the outbound carriers compensation on ex-barge transhipments could not exceed the compensation accepted on like movements of ex-rail shipments, barring circumstances found not to exist in this case. The effect of the Commission's determination that the lowest division accepted measured the discrimination did not require rates set at the level of the divisions existing before the determination of discrimination, but at any level which the railroads would find acceptable as long as the same measure applied to ex-barge traffic from the same port to the same destination. The "compensation" referred to in Arrow is a comparison of compensation accepted, not reasonable compensation or that which is compensatory. The essence of the Arrow opinion and the Mechling and following cases was to require equality of treatment for the ex-barge traffic. The "compensation accepted" by the outbound carrier as the test prescribed by Arrow must be read in that light rather than in the light of the railroad rate structure.

In the same connection, the railroads complain that the imposition of flat rates from the ports in an effort to comply with the Commission's order discriminate against the inbound railroads. Presumably this is because under the division system the inbound railroad absorbs the cost of providing the car ready for transhipment to the outbound carrier whereas origination service must be absorbed by the outbound carrier for ex-barge reshipments. The argument ignores the fact that the Commission found that the costs of movement to the interchange point, the additional costs which the railroads sought to establish as justifying a higher compensation for the outbound movement of ex-barge grain, had not been substantiated, as related to the division of the outbound carrier. Furthermore, it is the

Court's understanding that when flat rates had been imposed in an attempt to comply with the Commission's order, the transit privileges had been cancelled and the costs for the same were treated as a separate factor.

In any event, the inequity, if any, results as much from the maintenance of the previous railroad rate structure as from the Commission's order. The Commission is not required to frame its findings in such a way as to preserve the rail rate system intact. Arrow, supra, p. 420; Mechling, supra, at 580.

The heart of the railroads attack on the Commission's order is that the evidence was substantial in support of cost differences in the service performed by the outbound carriers on ex-barge and ex-rail grain and not inconclusive as the Commission found. There is no dispute that the divisions presented in the record revealed consistently lower compensation to the outbound carrier than the rates imposed on the ex-barge reshipments.

The Court has carefully examined the record before the Commission and the findings. The evidence submitted by the railroads tended to show that the costs of handling short haul reshipments were greater per 100 short-line miles than long-haul rail traffic, whether transited at the ports in question or not. It related the service costs to the joint-rate as a whole. It did not reveal additional costs for ex-barge handling for the corresponding handling of ex-rail shipments covered by the outbound carrier's division. The reshipping division applied from the interchange points. The reshipping rate sought by the water carriers was for the same service. Plaintiffs' witnesses could not specify any circumstance which would entitle the outbound carrier to greater compensation for reshipment of ex-barge than received for ex-rail grain. Only where the witnesses assumed

a service performed by the inbound rail carrier for all rail shipments would be performed by the outbound carrier in the event of ex-barge reshipment, could a cost differential to the outbound carrier be anticipated? Such service or the costs thereof were never established.

A reading of the record before the Commission leads to the conclusion that the findings are supported by the record. The Court does not find error in the Commission's findings that a cost differential for transited ex-rail and ex-barge grain for reshipment from the ports was unsubstantiated. There is a rational basis for the Commission's conclusion. Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 267, aff'd. 374 U.S. 95; Koppers Company v. United States, 166 F. Supp. 96. The Commission's findings and order is presumptively valid and the Court concludes that the findings and conclusions are not arbitrary, but are adequate and supported by the record and are in accordance with the law. This Court's judicial function, therefore, ceases as to the Commission's orders of July 6, 1962, and January 30, 1963.

The intervening defendants filed a motion to dismiss the complaint in part. The basis of the motion is that Finding number 2 of the Commission's order is not attacked. Therefore, insofar as the petition is worded to seek the annullment, enjoinder and suspension as to ultimate finding number 2, it should be dismissed. In view of the Court's conclusions as set forth above the questions raised by the motion to dismiss are moot.

The petition in this case was filed on April 22, 1963. The orders under attack in the petition are those of July 6, 1962 and January 30, 1963, requiring the railroads to cease and desist from charging the rates found to cause unlawful discrimination. Tariffs first filed were rejected by the Commission April 24, 1963. By those tariffs the transit privi-

leges at barge unloading ports were cancelled and flat rates made to apply on all grain reshipped from the ports regardless of the prior means of transportation. On through rail traffic to points beyond, the joint rail rates were to be continued. A letter of the Director of Traffic of the I.C.C. explained by letter dated April 25, 1963, the Commission's rejection of the proposed tariffs stating that "the Commission's findings and order require the establishment of exbarge rates related to the lowest divisions which the rail carriers receive out of the all-rail rates applicable via the ports, *whether transited or not* . . ." The plaintiffs point out in their brief that such an interpretation is not supported by the Commission's findings.

The Court questions whether the plaintiffs' complaint regarding the Commission rejection of tariffs dated April 24, 1963, is properly before us. The petition was never amended or evidence offered to present the issue. Some of the parties, nevertheless, discuss it in their briefs. It is offered in the brief of the rail carriers as providing a basis of analysis and understanding of the issues. Therefore, any conclusions of this Court based thereon would be purely advisory.

In view of the foregoing conclusions judgment will be entered dismissing the complaint and the costs of this action will be charged to the plaintiffs.

Dated this 24th day of August, 1964.

(s) M. C. MATTHES,
M. C. Matthes, Circuit Judge.

(s) ROY W. HARPER,
Roy W. Harper, District Judge.

(s) JOHN K. REGAN,
John K. Regan, District Judge.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHICAGO, ROCK ISLAND, & PACIFIC R. CO., et al., Plaintiffs, V. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	No. 63C 145(3)

JUDGMENT

This action came on for trial before a Statutory Three-Judge Court composed of Honorables M. C. Matthes, United States Circuit Judge and Roy W. Harper and John K. Regan, United States District Judges.

It is ORDERED and ADJUDGED in accordance with Memorandum Opinion heretofore filed that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs their costs of action.

Dated at St. Louis, Missouri
this .... day of ....., 1964.

(s) M. C. MATTHES,
M. C. Matthes, Circuit Judge.

(s) ROY W. HARPER,
Roy W. Harper, District Judge.

(s) JOHN K. REGAN,
John K. Regan, District Judge.

APPENDIX D

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of July, A. D. 1962.

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

It appearing, That in court review of the report on further hearing in this proceeding, 306 I.C.C. 167, decided March 24, 1959, the United States District Court for the Northern District of Alabama rendered its decision in *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411, affirmed *per curiam* in *State Corporation Commission of Kansas* v. *Arrow Transportation Co.*, 361 U.S. 353, by which the proceeding was remanded to us with instructions;

It further appearing, That in accordance therewith, by order of February 25, 1960, the Commission reopened the proceeding for limited further hearing, and for reconsideration of certain issues, as set forth therein;

And it further appearing, That the said further hearing has been held, that the issues have been reconsidered, and that, on the date hereof, the Commission made and filed a second report on further hearing, which report and the prior reports, 296 I.C.C. 247, 303 I.C.C. 463, and 306 I.C.C. 167, are hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and

they are hereby notified and required to cease and desist, on or before October 12, 1962, from maintaining, demanding, or collecting for the transportation of ex-barge grain and grain products, in carloads, rates or charges which cause the unlawful discrimination against the complaining barge lines as connecting carriers and the unjust discrimination against shippers, found to exist in said second report on further hearing.

It is further ordered, That the said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 12, 1962, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of ex-barge grain and grain products, in carloads, as described in the said second report on further hearing, rates and charges which will prevent and avoid the discrimination found to exist in said report.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX E

Service Date
February 25, 1963

CORRECTED ORDER*

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 30th day of January, A. D. 1963.

No. 30744

AMERICAN BARGE LINE COMPANY ET AL.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Upon consideration of the record in the above-entitled proceeding, and of four petitions, one of which was filed August 31, 1962, by the Southern Railway System, the other three having each been filed on September 4, 1962, by Western Railroad defendants, by Official Territory rail defendants, and by Southern rail defendants (excluding the Southern Railway System), in which petitions reconsideration and/or reargument (and requests for extension of the effective date of the outstanding order of compliance) is sought with respect to the report and order of the Commission entitled Second Report of the Commission on Further Hearing, dated July 6, 1962; and of three replies thereto, one of which was filed by Waterways Bulk Transportation Council, Inc., on September 21, 1962, the other two having each been filed on September 24, 1962, by complainants American Commercial Barge Line Company and Federal Barge Lines, Inc., and by Arrow Transportation Company, the State of Alabama, the State of Tennessee, Alabama Farm Bureau Federation, the City of Guntersville, Alabama, Guntersville Chamber of Commerce, Chattanooga Area Milk Producers Association, Chattanooga Chamber of Commerce, Knoxville Chamber of Commerce,

the City of Decatur, Alabama, Decatur Chamber of Commerce, Farmers Union Grain Terminal Association, Indiana Farm Bureau Cooperative Association, Inc., Tennessee Farm Bureau Federation, and the Tennessee Valley Authority; and for good cause appearing:

It is ordered, That the aforesaid petitions be, and they are hereby, denied for the reason that insufficient grounds have been presented to warrant a grant thereof, except that, for purposes of clarifying said Second Report of the Commission on Further Hearing, the last sentence of finding 1 be, and it is hereby, stricken and a new paragraph be, and it is hereby, inserted following finding 2 to read "In instances where the divisions accruing to the rail lines from the ports to the same destination differ depending on inbound rail routing, discrimination will exist to the extent that the exbarge rate is higher than the lowest division over the route of movement", the phrase "discriminatory against connecting for-hire barge lines" in findings 1 and 2 be, and it is hereby, amended to read "discriminatory against connecting common carriers by water subject to part III"; and lines 4 and 22 on the same sheet 24 be, and they are hereby amended by inserting the word "respective" before the word "rail" in each instance, said findings 1 and 2, as hereinabove revised, and the additional paragraph subsequent thereto, to read as follows:

> 1. That on grain and grain products hauled by for-hire barge to the Mississippi River ports of Memphis, Tenn., Greenville and Natchez, Miss., and New Orleans and Baton Rouge, La., and moved by rail from those ports to points in southern territory or to points in Arkansas and in Louisiana west of the river, rates for the rail movement of such traffic from the ports are and for the future will be discriminatory against connecting common carriers by water subject to part III, and unjustly discriminatory against shippers whose grain

and grain products reach those ports by for-hire barge transportation, to the extent that those rates exceed the contemporary rates or the lowest divisions received by the respective rail lines, over which the ex-barge traffic moves, out of joint all-rail rates applicable on grain and grain products from the same origin territory through those ports to the same destinations.

2. That on similar traffic hauled by for-hire barge to the Tennessee River ports of Decatur, Florence-Sheffield, and Guntersville, Ala., and Knoxville and Chattanooga, Tenn., and moved by rail from those ports to destinations in southern territory, rates for the rail movement of such traffic from those ports are, and for the future will be, discriminatory against connecting common carriers by water subject to part III, and unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation, to the extent that those rates exceed: (a) from Chattanooga, the contemporary rates or the lowest divisions received by the respective rail lines over which the ex-barge traffic moves out of the joint all-rail rates applicable on grain and grain products from the same origin territory through Chattanooga to the same destinations; and (b) from the other named Tennessee River ports, rates which reflect the same percentages of the corresponding first-class rates which the said contemporary rates or the lowest divisions from Chattanooga bear to the first-class rates from thence to the same destinations.

In instances where the divisions accruing to the rail lines from the ports to the same destination differ depending on inbound rail routing, discrimination will exist to the extent that the ex-barge rate is higher than the lowest division over the route of movement.

It is further ordered, That the outstanding order of July 6, 1962, requiring compliance by defendants with the terms thereof by October 12, 1962, which effective date was indefinitely postponed by the Chairman of the Commission by

order of September 7, 1962 (after the filing date of the petitions in which such postponement was requested), be, and it is hereby, reinstated and modified so as to reflect the modifications made in the report by this order, and so as to require compliance with the terms thereof within 60 days from the service date of this corrected order.

And it is further ordered, That this order shall continue in full force and effect until the further order of the Commission.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

*This order has been corrected to reflect the change from 30 days to 60 days for compliance with the terms of the order.

29675

INTERSTATE COMMERCE COMMISSION

No. 30744

AMERICAN BARGE LINE COMPANY ET AL. v. ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

Decided July 6, 1962

Upon further hearing, found that assailed rates on ex-barge shipments of grain and grain products from certain bargeline ports of discharge on the Mississippi River to points in the South, in Arkansas, and in Louisiana west of the river, and similar rates on grain and grain products from certain barge ports on the Tennessee River to points in the South, are and will be in violation of sections 2 and 3(4) of the act. Unlawfulness required to be removed. Prior reports, 296 I.C.C. 247, 303 I.C.C. 463, and 306 I.C.C. 167.

Appearances as shown in prior reports and, in addition:

E. N. Bell, E. S. Davis, W. E. Davis, J. A. Gillen, H. B. LaTourette, R. K. Merrill, C. D. Temple, W. A. This, Donald M. Tolmie, and *E. Vanneman, Jr.,* for defendants.

Joseph E. Quin for the Secretary of Agriculture of the United States, intervener.

Alexander B. Hawes, Craig Mathews, Hubert L. Bass, Carl J. Lessing, and *McDonald Gallion* for other interveners.

SECOND REPORT OF THE COMMISSION ON FURTHER HEARING

GOFF, *Commissioner:*

Exceptions to the recommended report were filed by the complainants and interveners in support, and the defendants and an intervener replied. We have heard the parties in oral argument. Our conclusions differ from those recommended. Exceptions and requested findings not specifically discussed herein nor reflected in the findings or conclusions have been considered and found not justified.

In our report on further hearing in this proceeding, 306 I.C.C. 167, decided March 24, 1959, we found that the failure of the defendants to apply to the rail transportation of grain and grain products, in carloads, hereinafter called grain, from bargeline ports of discharge on the Mississippi and Ohio Rivers to interior destinations in southern, southwestern, and western trunkline territories, when such traffic is brought to these ports by common carriers by water, including the complainants herein, proportional rates[1] the same as those which the defendants maintain for such transportation over the same rail routes from those ports to the same interior points when the grain is brought

[1] Rates are stated per 100 pounds, unless otherwise indicated.

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to said ports by rail, is and for the future will be discriminatory under section 3(4) of the Interstate Commerce Act.

In a second phase of the complaint, we found that the rates applied on rail shipments of ex-barge grain from the Tennessee River ports of Decatur, Sheffield, and Guntersville, Ala., and Knoxville and Chattanooga, Tenn., to interior destinations in the South are, and for the future will be, unduly prejudicial to those ports and unduly preferential of Memphis, Tenn., and shippers there located, to the extent that they exceed rates reflecting the same percentage of the uniform first-class rates therefrom as the proportional rates from Memphis bear to the same uniform first-class rates from that point to the same destinations, in violation of section 3(1) of the act. A similar finding was made of undue prejudice to New Orleans, La., and undue preference of Memphis with respect to the proportional rates on ex-barge shipments from New Orleans to points in Mississippi, Alabama, Georgia, and Florida, and rates from New Orleans to points west of the Mississippi River in Louisiana groups 2, 3, and 4, which were on levels higher than the corresponding proportional rates from Memphis to the same points.

The railroads obtained court review of our order of March 21, 1959, giving effect to the findings above stated, and the United States District Court for the District of Kansas in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 194 F. Supp. 438, sustained those findings.

No proportional rates are maintained from the Tennessee River ports to destinations in the South, nor are such rates published to all destinations in the South and Southwest from certain of the lower Mississippi River port cities. Also, no proportional rates apply on coarse grains within and to the South. When two or more railroads have established routes through the port cities, joint rates, either flat[2] or proportional, apply on shipments which move over those routes, either in continuous movement or when stopped for transit at those cities where the latter is authorized in the governing tariffs. The revenue derived from the joint rates is apportioned among the railroads participating therein according to agreed divisions or portions of such rates. When the through route embraces different railroads to and from the port cities, the divisions of the joint rates "break" on those cities. When the shipment is over a through route in which the inbound carrier is also the outbound carrier from the port city, the divisions break on the junction with its connecting line or lines.

In paragraph V of the amended complaint initiating the proceeding, the complainants, Federal Barge Lines, Inc., American Commercial Barge Line Company,[3] and Arrow Transportation Company,

[2] A flat rate is one applied to the transportation as a complete movement, not dependent upon a previous inbound or subsequent outbound movement.

[3] Successor in interest to the original complainant, American Barge Line Company.

common carriers by water hereinafter called Federal, American, and Arrow, alleged also that the local rail rates applicable on ex-barge grain from the river ports are unlawful to the extent that they exceed the "charge, or divisions received by defendants" of the joint through all-rail rates on grain "which originated in the same territory or at the same points as the bargeline ports of loading, or exceed a charge which fairly represents the proportion of the through all-rail rate to which the defendants are reasonably entitled for the portion of the through all-rail service which corresponds to the service rendered by them on ex-barge grain from and to the same points." As set forth in the prior reports herein, evidence of the defendants' divisions of joint rates through the barge ports of unloading shown in the complaint was ruled inadmissible. In the report on further hearing it was stated that since the complaint did not seek through routes and joint rates, the ruling was sustained.

Arrow and various interveners interested in ex-barge rates from the Tennessee River ports to interior destinations in the South instituted court action to set aside the order of March 24, 1950, on the ground that we had erroneously refused to receive evidence of the divisions of the joint rates as a measure of the discrimination on ex-barge grain. In the *Arrow* case, *Arrow Transp.* v. *United States*, 176 F. Supp. 411 (affirmed *per curiam*, *State Corp. Comm. of Kansas* v. *Arrow Transp. Co.*, 361 U.S. 353), the District Court for the Northern District of Alabama held that it was error to refuse admission of evidence regarding divisions, and remanded the proceeding "with instructions to the Commission to enter an order prescribing lawful, reasonable, and nondiscriminatory rates on ex-barge traffic from the Tennessee River ports to destinations in the Southeast in conformity with this opinion." The court prefaced its holding of error with the following:

> It is immaterial to the question of discrimination whether the compensation a carrier receives on ex-rail traffic is in the form of a separately established proportional rate, or a division of a through rate. In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination. This is not to suggest that the division received by the outbound railroad on ex-rail traffic necessarily establishes the exact rate at which ex-barge traffic must be handled. We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements.

Pursuant to the court's decision and order, on February 25, 1960, we reopened the proceeding (1) for further hearing solely to receive evidence (*a*) with respect to the divisions of joint rates on grain re-

ceived by defendants on ex-rail traffic which has moved to the named Tennessee River ports by railroads connecting with defendants' lines at said ports, and the divisions of joint rates received by them on ex-rail traffic which has moved to the Mississippi River ports named in paragraph V of the complaint as amended (Memphis, Tenn., Greenville, Natchez, and Vicksburg, Miss., and New Orleans and Baton Rouge, La.), and (b) relevant to whether and to what extent such divisions should determine the rail rates from those ports on ex-barge traffic; and (2) for reconsideration of the issues under sections 1, 2, and 3(4) of the act as they relate to (rates from) those ports, in the light of the opinion and order of the district court.

Following prehearing conferences, at which the parties agreed upon representative rates to the South and to Arkansas and Louisiana, out of which the defendants receive divisions for their services in handling ex-rail shipments from the port cities, committees of railroad personnel ascertained the amounts of such divisions and furnished the information to the complainants for use in preparing their evidence.

The Waterways Bulk Transportation Council, Inc., a nonprofit corporation with a membership including contract carriers and common carriers by water whose operations have been entirely under the exemption provided by section 303(b) of the act, other such carriers who conduct part of their operations under that exemption, and shippers who ship all or part of their shipments by water as exempt transportation, intervened at the hearing but presented no evidence. The council's interest in this proceeding is to have any order which is issued requiring removal of any discrimination found against the traffic of the complainants apply equally in favor of uncertified water carriers and unregulated water carriage.

Valley Mills and Vicksburg Terminal Elevators, divisions of the Merchants' Company located in Vicksburg, intervened seeking rates on ex-barge traffic from Vicksburg to the destinations in southern territory and in Louisiana west of the river on the same basis as those accorded New Orleans and other river ports shipping to the same destinations. New claims of undue prejudice and preference under section 3(1) are beyond the scope of the issues being reconsidered.

American and Federal seek a cease and desist order which will require the defendants to establish and maintain, on ex-barge grain from the river ports to the destinations in issue, rates no higher than the divisions which the defendants receive out of the joint rates or rate factors which apply on grain moving over all-rail routes via those ports to the same destinations. They say they "will be satisfied by any method of compliance with such an order" which produces an "equality of treatment and charges," either revision of the ex-barge rates, a revision of the rail divisions, or a revision in both, which

will achieve the desired parity. They do not claim discrimination with respect to traffic which moves in continuous service through the port cities. Their claims run only to "discrimination in the charges assessed on reshipments after a transit stop for storage or processing." They do not seek rates on ex-barge grain which cover more than the service rendered under the rail divisions of through rates on traffic transited at the barge port. The position of Arrow and certain supporting intervenors is much the same.

The nature of the grain-rate structure generally has been discussed in detail in the prior reports. With respect to feed and the coarse grains, principally corn, oats, barley, rye, and soybeans, a truck-competitive scale of rates within the South, originally established in 1957 and further reduced in November 1959, defeated the equalizing proportional rates from the gateways, and the latter were canceled. A similar truck-competitive scale of rates on soybean and other vegetable meals has been established which, except for the shorter distances, is even lower than the coarse-grain scale.

The discrimination found by the court to exist is occasioned by the existence in some instances of divisions accruing to the outbound carriers, principally on wheat and flour, from certain of the Mississippi and Tennessee River ports. American and Federal, and the Tennessee Valley Authority, presented examples of divisions received by the defendants out of the joint rates on the several types of grain and its products applying through Memphis and Chattanooga. From some other barge ports of discharge, no divisions could be shown, either because only one railroad serves the port, as at Vicksburg and Guntersville, or because the railroads serving the port maintain no joint rates through the port and interchange traffic there only at the outbound local rates, as at certain of the Tennessee River ports.

As representative of the discrimination from the Mississippi River ports, American and Federal compare the rates on the various grains from Memphis to six points in Arkansas on the Rock Island (Chicago, Rock Island and Pacific Railroad Company) and the Cotton Belt (St. Louis Southwestern Railway Company), and to about 30 destinations in the South which apply on ex-barge grain that has moved to Memphis from points on the upper Mississippi River, the Missouri River, and the Illinois Waterway, with the divisions which the defendants receive beyond Memphis of the through all-rail rates from the barge origins via Memphis to the same destinations. For example, on corn, oats, and soybeans originating at points on the upper Mississippi and Illinois Waterway destined to Atlanta, Ga., the ex-barge rate from Memphis is the flat rate of 39 cents. That rate is based on the previously mentioned truck-competitive scale of rates on coarse grains established on November 2, 1959, which was so low that it de-

feated the proportional rates. The divisions beyond Memphis on traffic to the South are generally percentages of the St. Louis or Cairo flat rates, which rates apply as factors of the combination rail rates from the barge origins over routes through Memphis to these destinations. They range from 69 to 115 percent of the flat rates from Memphis. The divisions of such factors for the rail service, Memphis to Atlanta, are as follows:

When inbound carrier [1] is—	And outbound carrier is—				
	Illinois Central	Southern	Gulf, Mobile & Ohio	Frisco	Louisville & Nashville
	Cents	Cents	Cents	Cents	Cents
Missouri Pacific	60	60.3	60.3	60	60.3
Gulf, Mobile & Ohio	33.5			33.5	
Frisco	60	60.3	60.3		60.3
Illinois Central		60.3	30.5	33.5	30.5

[1] The abbreviations refer to the Missouri Pacific Railroad Company, Gulf, Mobile and Ohio Railroad Company, St. Louis-San Francisco Railway Company, Illinois Central Railroad Company, Southern Railway Company, and Louisville and Nashville Railroad Company.

A similar situation obtains as to coarse-grain rates to Montgomery, Ala. The ex-barge rate from Memphis is the flat rate of 33 cents, compared with divisions beyond Memphis of 26.3, 27.2, 27.8, 28.4, 30.4, and 37.8 cents. Of the six divisions, only one is higher than the flat rate. This instance of multiple divisions is typical of many others depicted in the record.

On corn from Kansas City and other Missouri River origins, including Omaha, Nebr., to the Southeast via Memphis, the applicable through rail rates are combinations of flat rates on coarse grains made on a few points in northeastern Arkansas to which the southern coarse-grain scale has been extended. The ex-barge rates from Memphis are the rates in that scale, or 30 cents to Atlanta, compared with divisions beyond Memphis of 20.9 cents or 20.4 cents, depending upon the inbound carrier. These are divisions of the flat-rate factor from the points in northeastern Arkansas to Atlanta, which rates generally are only 1 or 2 cents higher than those from Memphis. Such divisions would in every instance be lower than the Memphis divisions on coarse grains originating on the upper Mississippi and the Illinois Waterway.

On soybean meal, one-factor rates apply from Pekin, Ill., to the South. The rate from Pekin to Birmingham is 42 cents. When applied over routes through Memphis, the divisions beyond Memphis range from 10.6 to 16.9 cents, as compared with an ex-barge rate of 23 cents. A similar variety of divisions occurs to most destinations; for example, to each of such points as Atlanta, Savannah, Ga., and Florence, S.C., there are five or six different divisions of the respec-

tive rates of 46, 56.5, and 56.5 cents. All of the divisions are much lower than those on soybeans, some by more than 50 percent.

On wheat and flour the situation is similar, except that from Memphis the ex-barge rates to the South are the same as the ex-rail proportionals from Memphis. The proportional is 46 cents to Atlanta, for example, compared with the following divisions for the service from Memphis to Atlanta over routes from St. Louis or Cairo, with transit at Memphis:

When inbound carrier is—	Illinois Central	Southern	Gulf, Mobile & Ohio	Frisco	Louisville & Nashville
	Cents	Cents	Cents	Cents	Cents
Missouri Pacific	47.6	48	48	47.6	48
Gulf, Mobile & Ohio	36.2			36.3	
Frisco	47.6	48	48		48
Illinois Central		48	36.2	36.3	36.3

To some points every division is higher, and to others every division is lower, than the corresponding proportional from Memphis applicable on ex-barge wheat. They range from 53 percent to 118 percent of such proportionals. To destinations in Mississippi Valley territory, the lowest combinations are made on Memphis. While the complainants show divisions of those rates beyond Memphis, the amounts shown are identical with and actually are the proportional rates from Memphis to such destinations and are, of course, available on ex-barge as well as on ex-rail traffic.

To all points in southern territory to which proportional rates from Memphis are maintained on ex-rail wheat and flour, the same rates apply on ex-barge shipments from Memphis. As the interterritorial wheat rates to Mississippi Valley and southeastern territories[4] are generally combinations on the border gateways equalized through those gateways, such as St. Louis, Cairo, and Memphis, the combinations on Memphis normally would apply over routes through that gateway, and the defendants would obtain the Memphis proportional rate, as above indicated. Thus, there would be no instance in which divisions of joint rates would accrue to carriers beyond Memphis, and since the same proportionals would apply on ex-barge traffic, there would be no disparities between the ex-barge and ex-rail rates from Memphis. However, there is presently a variance, generally of 1 cent or less, in the amounts of the combination rates made over the various gateways to the South, which arose from the application of percentage increases to the factors of such combinations, or because the southern railroads did not avail themselves of a recently authorized general increase. The carriers are taking steps to adjust the

[4] Defined in *Grain to, from, and within Southern Territory*, 250 I.C.C. 629, 634 (footnote).

rates so as to restore the equality of the combinations over the various gateways. The complainants' showing of lower, and in many instances higher, divisions beyond Memphis on wheat and flour than the present ex-barge proportionals from that port reflects that disruption of the equalization and its consequences, namely, that to many points in the South the lowest combination of rates is made over St. Louis or Cairo, and when the proportional factor from either of those gateways is applied over routes through Memphis the divisions thereof which accrue to defendants beyond Memphis are in many instances lower than the Memphis proportional, which they would normally receive.

Memphis is served by eight railroads. With respect to destinations in Arkansas, only six all-rail routes subject to joint rates with interchange at Memphis are provided on grain traffic from points beyond Memphis. The destinations are on the Rock Island or the Cotton Belt and their short-line connections. On movements from or via Kansas City or St. Louis, for example, to points in Arkansas, multiple divisions occur beyond Memphis dependent upon whether the movement is over the Rock Island or the Cotton Belt. Because of the necessity of "padding" the proportional rates from Kansas City and St. Louis, when the grain is from Kansas, Missouri, and Illinois origins, to offset the lower inbound rates and preserve market equalization, or because of the minimum rate provisions which apply when the rates are made over those gateways, proportionals varying with the amount of the pad apply from those points through Memphis. As the divisions beyond Memphis are percentages of the proportionals, there are as many different divisions as there are padded proportional rates to a single destination.

To Little Rock, the flat rates from Memphis are 28.5 cents on coarse grain and 37.5 cents on other grains, while the divisions to the Cotton Belt of the proportional rates from St. Louis are 11.7 and 16 cents, respectively. On rates from Kansas City, the divisions from Memphis to Little Rock are 11.3 cents on wheat and soybeans, and 8.6 cents on corn and oats. As an example of routing affecting divisions, the joint proportional rates on corn and oats from St. Louis to Brinkley, Ark., via Memphis, are 30 cents in connection with the Frisco to Memphis and 23.5 cents in connection with the Illinois Central or the Gulf, Mobile & Ohio to Memphis, resulting in different divisions beyond Memphis.

Proportional rates from Kansas City and St. Louis apply over routes through Memphis or New Orleans, with transit, to points in Louisiana west of the river, the carriers beyond those ports obtaining divisions lower than the flat rates applied on ex-barge grain. For example, to destinations to which the flat rate from New Orleans is

35 cents, the Texas & Pacific's divisions of the joint rates are 13.3, 17.8, and 19.8 cents, dependent on the commodity and origin, and where the flat rate is 37.5 cents, the Texas & New Orleans, division is 20.9 cents.

The evidence does not show specific examples of rates and divisions from Greenville and Natchez, Miss., and Baton Rouge, La., to points in the destination territories. Presumably, where joint rates are established through those ports, the differences between the ex-barge rates and the divisions are similar. Vicksburg, however, is served only by the Illinois Central, and no divisions are available from thence to destinations.

Chattanooga lies due east of Memphis, south of Louisville, Ky., and northwest of Atlanta. It is served by the Louisville & Nashville, the Southern, the Central of Georgia, and the Tennessee, Alabama & Georgia, a short line which extends southward to Gadsden, Ala. These lines and their connections form routes from the Mississippi and Ohio River crossings through Chattanooga to the Southeast and Carolina territory.[5]

The general pattern of divisions beyond Chattanooga differs from that at Memphis, chiefly because Chattanooga is an interior point in southern territory and "prorating" points are generally recognized in determining the divisions. A prorating point is one served by competing rail routes over which the carriers have agreed that certain percentages producing uniform proportions of the revenue shall accrue to the carriers operating to and beyond interior gateways or junctions. There are about 120 of these points in the South, but, of course, a much greater number of local or nonprorating points, some of which may also be common points.

Chattanooga and Birmingham and Montgomery, Ala., are the interior gateways to the Southeast over which the rates from the Ohio or Mississippi River crossings to the prorating points are initially "broken" in determining the divisions to such points, and here the agreed percentages are used. However, to divide rates to nonprorating points, namely, the local stations or common points, another agreed percentage[6] of the rate from the river crossings which is allowed the delivering line is first deducted, and the balance is then divided on the major agreed percentage; first, broken over the gateways to the Southeast, and then subdivided among the lines north of and south of such gateway. To illustrate: To Hazelhurst, Ga., which is not a prorating point but is served by the Southern and the Georgia & Florida, there are a number of routes from Louisville via the several

[5] See footnote 4.

[6] These percentages are those agreed upon from the oncoming junction of the delivering carrier, when it is a prorating point. When it is a nonprorating point, the further subdivision must be worked out with the other participating lines.

junctions at which the Georgia & Florida can receive the traffic. Its division varies with the junction used. The divisions to and beyond Chattanooga of the balance of the rate from Louisville, for example, will likewise vary. As the rates from other Ohio River gateways are different, there are also sets of different divisions beyond Chattanooga, when dividing each of those rates.

There are situations where shipments move to a point to which rates are published but as to which there is no agreed basis of interior divisions. In such a case the accounting department of the delivering carrier works out a basis of divisions which it considers reasonable, but only after a shipment has moved. If the carrier intermediate to the delivering line disagrees, it submits a statement of differences to the delivering line. If that line declines the statement of differences, the matter is handled by correspondence through the accounting and traffic departments. When no agreement can be reached, the statements of differences are accumulated and each one discussed at a conference arranged with the destination line. In the course of such negotiations the merits of each statement may be considered only in a technical sense, as where two contending lines offset or compromise their respective statements of differences against each other, as a matter of bargain and trade.

To Carolina territory, in which there are no prorating points except Charleston, S.C., the revenues from grain rates are divided by first allowing percentage proportions beyond Atlanta, when the traffic is so routed, or beyond Paint Rock, N.C., the first station on the Southern as it enters the State from the west. These divisions vary dependent upon the rate from the Ohio River, being 46 percent of the rates from Cincinnati or Louisville, and 42 percent of those from Evansville or Cairo. The remainder is divided on the agreed percents which break on Chattanooga. The resulting divisions, as in the case of those over Chattanooga to the Southeast, are not constant.

Following is a comparison of the rates applying on ex-barge wheat and flour from Chattanooga to the specified destinations, with divisions accruing to the carriers beyond Chattanooga from the joint rates applicable from the river crossings:

Destination	Ex-barge rate	Division
	Cents	*Cents*
Anniston, Ala.	38	13.4
Jacksonville, Fla.	72.5	37.8
Atlanta, Ga.	60	14.3
Cordele, Ga.	54.5	20.4
Augusta, Ga.	65.5	28.3
Habira, Ga.	65.5	35.7
Roseville, Ga.	17.5	9.6
Savannah, Ga.	68.5	26
Wilmington, N.C.	82	41.6
Orangeburg, S.C.	65.5	41.3

While in the report on further hearing at page 174, it was stated that through all-rail rates apply via the Tennessee River ports, the present record shows that, except at Chattanooga, when shipments are stopped for transit at these ports no through rail routes are maintained, and combinations of the flate rates made on the port apply. Guntersville, Ala., at the termination of a stub-end branch line, is served only by the Louisville & Nashville. The carriers serving Knoxville, Tenn., and Decatur and Sheffield, Ala., the remaining three Tennessee River ports, will accept transit traffic from connecting lines at those points only at the flat rates outbound. Routing in the Southern's transit tariff provides that on traffic destined to points in Mississippi Valley territory, it will accept traffic from transit at Chattanooga, hauled inbound by connecting lines, only at the flat rates outbound. In those situations, there are no divisions applicable from the ports.

Railroad witnesses admit that equal service is performed on ex-rail and ex-barge shipments moving beyond the ports to the same destinations from the same elevator or mill where the transit occurs. However, it is urged that since the bulk of the barge traffic is whole grain generally, it can be expected to require additional transit services as it moves from the ports to ultimate destinations by rail. In an all-rail haul, the burden of providing transit is distributed over all the participating railroads, while in a barge-rail haul the burden is not shared by the bargeline; therefore, the defendants urge, ex-barge traffic is not entitled to the portions of rail rates which reflect such sharing among the railroads.

To show that they perform more service in the South on grain originating and terminating in that territory than on traffic which moves from other areas to the South, the defendants presented evidence based upon a traffic study in which the services are compared. This study shows that on movements within the South the railroads bear a heavier service burden per 100 short-line miles, as represented by the number of transit handlings, than they do on interterritorial traffic.

A single rail transit stop entails two handlings, extra destination and origin terminal services, and a longer line haul when it takes place off the direct route. The costs of rail service increase as distances and the number of transit handlings increase. The transit handlings per 100 short-line miles in the South were 0.15 and 0.36 on grain which originated in the West and official territory, respectively, and 0.59 for that first moving by rail within the South. The average number of transit handlings and the average circuity of the hauls which oc-

curred within the South, on traffic originating in the territories shown, are computed as follows:

Origin territory	Short-line distance in the South	Circuity in the South [1]	Average transit handlings in the South
	(*Miles*)	*Percent*	
West	538	23.2	0.8
Official	418	21.9	1.5
South	424	43.7	2.5

[1] Computed from the southern gateway on interterritorial movements.

The study does not purport to compare services performed on ex-barge traffic with those performed on corresponding ex-rail traffic. The considered interterritorial movements include traffic moving in continuous through service, traffic interchanged at the crossings, and rail traffic stopped for transit at the crossings. The movements considered within the South were confined to those on which transit was taken, including ex-barge and rail intraterritorial shipments. Consideration of nontransit traffic would have influenced to an unknown degree the resulting average measurement of service related to transit.

Considerable evidence said to relate to the cost of handling ex-barge grain also was offered by witnesses of the western trunkline and southwestern-territory railroads. It purports to show, among other things, that the supplying of empty cars for transited ex-barge grain is a cost avoided by the railroads in handling transited ex-rail grain, the inbound cars being available for outbound ex-rail movements. That evidence, however, was inconclusive of the point sought to be made. On the record before us, we are unable to conclude that the defendant railroads have established that their costs for handling transisted ex-barge grain from river ports to inland destinations are substantially greater than their costs for handling transited ex-rail grain from and to the same points.

The Secretary of Agriculture requests a finding that the establishment of through barge-rail routes is required in the public interest, and that we require the complainants and defendants to provide such service; also, that we prescribe joint barge-rail rates. The complainants do not seek such routes with the defendants, and the record lacks sufficient evidence upon which to prescribe them. See *Virginian R. Co.* v. *United States*, 272 U.S. 658, 666, and *Thompson* v. *United States*, 343 U.S. 549.

The defendants urge that the evidence regarding divisions strongly supports the conclusion that they do not provide a reasonable standard for making rates on ex-barge traffic, and that if we require the divisions as rates on such traffic, violations of section 3(1) and of the long-and-short-haul and aggregate-of-intermediates provisions of section 4 will

occur. The fact that the divisions reflect the equalization of rates through the various river crossings, and therefore are independent of distance, is the basis for the first argument. Examples of the situations in which it is claimed that undue prejudice and preference would result are (1) where divisions of joint rates through certain ports are required, while from other ports higher separately established proportionals make the lowest through charge to certain destinations; (2) where barge corn from Missouri River origins would have available lower divisions from Memphis to the same destination than barge corn loaded at upper Mississippi River and Illinois Waterway ports, because the applicable all-rail rates on the former would be combinations over certain points in northeastern Arkansas to which the reduced southern coarse-grain scale has been extended; and (3) where, by reason of the fact that interior southern divisions to nonprorating points reflect the former basing-point system of ratemaking, such divisions, in numerous instances would produce higher rates for shorter than for longer distances over the same routes, this circumstance also creating section 4 violations.

Although the defendants argue at length on brief that the divisions are an inappropriate basis for determining the rates which should apply on ex-barge traffic, reference being made to several situations in which the barge movement would seek out the lowest rail division (generally over the most circuitous rail route), the argument is part and parcel of one previously rejected emphatically by the Court in the *Mechling* case [1] and cited by the court in the *Arrow* case; namely, that the relief sought by the bargelines would destroy the traditional grain-rate structure. In short, as the court held, in the absence of a demonstrated cost differential, a rail carrier from a port is entitled to no more compensation on ex-barge traffic than it obtains on ex-rail traffic from the same origin territory moving from transit at that port to the same destination. Our efforts to explain the equalizing nature of grain rates, and their function of permitting indirect routes and grain interests situated thereon to compete with the direct routes, have not impressed the courts. The suggestion of the defendants that we look to the rail haul which is displaced by the barge haul, and apply ratemaking standards to determine the ex-barge rate, would be futile so long as lower divisions applied on ex-rail traffic.

With reference to the claimed unlawful results in other respects, it is apparent that we cannot here consider all of the ramifications of removing the discrimination found by the court to exist. In a sense, every change in a rate or rates alters relationships, and might in the future be shown to have done so unlawfully. The methods of deter-

[1] *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

mining interior southern divisions are not in issue in this proceeding.

The order of the court raises the practical difficulties of determining which divisions should be the measure of the rate to be applied on ex-barge traffic where there are numerous divisions depending on the carriers constituting the inbound or outbound routes, and of devising a basis for nondiscriminatory rates on ex-barge shipments where no divisions break on the Tennessee River ports. With reference thereto, the court stated in the *Arrow* case:

> Whether the rates are published as proportional rates or as joint rates, the charges paid by the shipper for the movement of ex-barge grain beyond the ports must be on a level which preserves intact the savings on the water leg of the journey, *at ports where the inbound and outbound rail carriers are the same*, as well as at ports where the inbound and outbound rail carriers are different. [Emphasis added.]

Aside from the suggestion, previously referred to, that we prescribe through barge-rail routes, which are not sought by the complainants, and joint rates, for which there is no adequate basis of record,[*] certain other suggestions require consideration. The Mississippi River bargelines contend that where the railroads outbound from the ports are also the delivering lines, and they accept different divisions, each line should publish a reshipping rate on ex-barge grain on a parity with its division of the rail rate; and that where the line or lines from the ports obtain different divisions to the same destination depending on the inbound routing, they should publish reshipping rates equivalent to the lowest of those divisions beyond the ports. It is recognized that different reshipping rates might result on traffic between the same points, but it is urged that the situation is of the rail lines' own making and such a circumstance cannot stand as an obstacle to the removal of the discrimination.

The Tennessee Valley interests suggest the possibility of removing the unlawfulness at the Tennessee River ports by requiring the publication of ex-barge rates from Chattanooga no higher than the existing divisions of the joint rates, and from the other Tennessee River ports, ex-barge rates on the same level as those from Chattanooga, eliminating fourth-section departures which would otherwise result from use as the basis for divisions of the basing-point system of rate-making, previously required to be abandoned. All of the complainants request that our order require the defendants to file with us records of their divisions from the barge ports. They recognize that

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[*] Even if we were to prescribe joint rates the equivalent of the barge rates to the ports and the divisions beyond, we would have to require the filing of tariffs of all barge rates not now filed, because the transportation is otherwise exempt. Furthermore, problems would arise concerning the difference in bargeload and carload minima, etc. *See Bulk and Barge Joint Rates*, 270 I.C.C. 591, 618, in which such rates were not prescribed on bulk commodities.

the defendants should be permitted alternatives; for example, to adjust their divisions, their concern simply being that both ex-barge and ex-rail traffic be subject to the same charges for the same service beyond the ports, however the result may be attained.

The defendants have not overcome by their evidence the *prima facie* case of discrimination made out by the showing of the differences in the divisions of rail joint rates and the rates which now apply on ex-barge traffic from ports through which such joint rates apply. As the defendants point out, this record provides no basis for requiring specific changes in the southern divisions, because they are not in issue *per se*, and no evidence of the nature contemplated by section 15(6), which empowers us to prescribe divisions, appears on this record. Nevertheless, it is the lower divisions which cause the discrimination found by the court to exist. We shall require the elimination of the discrimination without prescribing the exact method of removing it. Whether flat or local rates are established which apply exclusively from the ports on all grain traffic regardless of how it arrives at those ports, or ex-barge proportional rates which are no higher than the corresponding divisions of the rail joint rates over the route of movement from the ports, there is no longer any doubt that ex-barge grain must be treated, as nearly as practicable, in the same manner ratewise as is ex-rail grain. If divisions are used as the basis for establishing nondiscriminatory ex-barge rates, such rates from the Tennessee River ports other than Chattanooga will be required to reflect the same level as the lowest division from Chattanooga to the same destination; that is, the ex-barge rates from the other Tennessee River ports must bear the same percentage relations to the first-class rates therefrom as the lowest divisions from Chattanooga bear to the first-class rates from thence to the same destinations. Moreover, if divisions are used, the pertinent division sheets must be filed with us, and any subsequent changes therein also must be filed.

The Tennessee River interests, including Arrow, rely in part also on section 2 of the act. They seek relief, not only where the carriers to and beyond the port are different, but also where the inbound and outbound railroad is the same, as at Guntersville, and where separate railroads serving the port, in order to protect their routings, do not interchange traffic with each other, as at Florence-Sheffield, Knoxville, and Decatur. Finally, the Waterways Bulk Transportation Council contends that the required relief should apply to ex-barge shipments transported under the exemption of section 303(b), "whether or not the transporting carrier is certificated or holds no certificate," and asks that our order so provide.

As is evident from the court's pronouncements in the *Arrow* case, all of this traffic by barge falls under the rationale of the court's decision. Exempt transportation was included in the *Mechling, Blue Line*,[9] and *Dixie Carriers* [10] cases, and no distinction was made in the *Arrow* case. In the latter case the court stated:

> Likewise, [the Commission] is prohibited by section 2 from permitting the discrimination between shippers which would result from charging higher rates for the outbound movement to the shipper who receives his inbound grain by barge than apply to the shipper who receives his inbound grain by rail * * *.

The shipper discrimination thus referred to by the court is present here as between ex-barge and ex-rail grain moving from the port under substantially similar circumstances and conditions, not only where the grain by barge is moved to the port by a common carrier certificated by us, but also where the grain is moved to the port in exempt for-hire transportation.

We find and conclude:

1. That on grain and grain products hauled by for-hire barge to the Mississippi River ports of Memphis, Tenn., Greenville and Natchez, Miss., and New Orleans and Baton Rouge, La., and moved by rail from those ports to points in southern territory or to points in Arkansas and in Louisiana west of the river, rates for the rail movement of such traffic from the ports are and for the future will be discriminatory against connecting for-hire bargelines, and unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation, to the extent that those rates exceed the contemporary rates or the lowest divisions received by the rail lines, over which the ex-barge traffic moves, out of joint all-rail rates applicable on grain and grain products from the same origin territory through those ports to the same destinations. In instances where the divisions accruing to the rail lines from the ports to the same destination differ depending on inbound or outbound rail routing, discrimination will exist to the extent that the ex-barge rate is higher than the lowest of those divisions.

2. That on similar traffic hauled by for-hire barge to the Tennessee River ports of Decatur, Florence-Sheffield, and Guntersville, Ala., and Knoxville and Chattanooga, Tenn., and moved by rail from those ports to destinations in southern territory, rates for the rail movement of such traffic from those ports are, and for the future will be, discriminatory against connecting for-hire bargelines, and unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation, to the extent that those

[9] *James McWilliams Blue Line, Inc. v. United States*, 100 F. Supp. 66; affirmed, *per curiam*, 342 U.S. 951.

[10] *Dixie Carriers, Inc. v. United States*, 351 U.S. 56.

rates exceed: (*a*) from Chattanooga, the contemporary rates or the lowest divisions received by the rail lines over which the ex-barge traffic moves out of the joint all-rail rates applicable on grain and grain products from the same origin territory through Chattanooga to the same destinations; and (*b*) from the other named Tennessee River ports, rates which reflect the same percentages of the corresponding first-class rates which the said contemporary rates or the lowest divisions from Chattanooga bear to the first-class rates from thence to the same destinations.

In complying with the above findings, the defendants may require the furnishing of a certificate showing the origin area of the inbound barge grain or grain products. No other conditions should be attached to the application of the outbound rates on ex-barge traffic which are not attached in connection with corresponding ex-rail traffic. If divisions are made the measure of the ex-barge rates published in compliance with the order herein, the defendants will be required to file with us, and to maintain on a current basis, the appropriate division sheets or other evidence of the contemporary sharing of the revenue from the joint through all-rail rates.

An appropriate order will be entered.

COMMISSIONER TUGGLE, concurring in the result:

I concur generally in the findings of unlawfulness in this report because, in my opinion, such findings are dictated by the rationale of the court in the *Arrow* case and the other cited court authorities, including the *Mechling* and *Dixie Carriers* cases.

The conclusion of the court that rail divisions constitute a proper yardstick for measuring discrimination against ex-barge traffic, as I understand it, is directed primarily towards avoiding unlawful discrimination against public for-hire water carriage and shippers utilizing such service in connection with rail hauls beyond the river ports, as contrasted with all-rail through routes and joint rates. Accordingly, I would specifically limit the findings of unlawfulness to through barge-rail traffic, that is, traffic which retains its character as through traffic to the extent that it would be subject to joint barge-rail rates if such rates were published.

Under the reasoning of the cited court decisions, it seems to me that sounder results could be obtained in a proceeding of this kind if it were broadened to the extent of providing an adequate record upon which through barge-rail routes and joint barge-rail rates could be prescribed when such action was necessary to remove unlawful discrimination against public for-hire water carriage within the meaning of the Interstate Commerce Act.

COMMISSIONER HUDDLESTON, dissenting in part:

The record shows that there are 77 different divisions beyond Chattanooga to Valdosta, Ga., over routes involving the Southern Railway alone. This illustrates the tremendous number of divisional agreements which the majority report would require to be filed if ex-barge rates are maintained on a divisional basis. In the absence of a clear showing that such a requirement is necessary for compliance with the order, I would not impose upon the defendants the burden of compiling, filing, and keeping current the involved divisions. If divisions are to be made the measure of ex-barge rates, I would require defendants to file periodic verified statements that ex-barge rates are being maintained on the required basis.

COMMISSIONER BUSH, dissenting in part:

Arrow Transp. Co. v. *United States*, 176 F. Supp. 411, affirmed *per curiam*, 361 U.S. 353, is the case of first impression wherein the divisions received on ex-rail movement constitute *prima facie* evidence of the charge to be assessed upon ex-barge movement. Yet, as indicated by the court, this does not mean that the division received by the outbound railroad on ex-rail traffic from the same port to the same destination necessarily establishes the exact rate at which ex-barge traffic must be handled. Consequently, although this proceeding was remanded to us for entry of an order "prescribing ex-barge rates * * * on ex-barge traffic," which cannot be done upon the present record, I find no basis for the alternative determination that discrimination will exist to the extent that the ex-barge rate is higher than the *lowest* division of joint all-rail rates.

The rationale of the court opinions in the cases cited by the majority do not, in my view, bring exempt and/or private carriage within the purview of section 2 of the act, which is for the protection of shippers and receivers of freight. Moreover, section 3(4) clearly governs "All carriers subject to the provisions of this chapter * * *," and a connecting line is defined as "* * * any common carrier by water subject to Part III." Thus, in the absence of joint water-rail rates, water carriers exempt from regulation pursuant to the provisions of section 303 of the act and private water carriers are not afforded the corresponding rights and obligations of regulated modes of transport.

I find no authority under section 6(5) of the act to require carriers to file division sheets with us. In many instances, there is no predetermined or agreed basis of divisions between the participating carriers. It is a matter resolved subsequent to movement of a shipment through negotiation.

COMMISSIONERS FREAS and HUMPHREY did not participate.

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No. 770

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court
for the Eastern District of Missouri—Eastern Division

MOTION TO AFFIRM

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On Appeal from the United States District Court
for the Eastern District of Missouri—Eastern Division

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Federal Barge Lines, Inc., and American Commercial Barge Line Company move that the judgment of the district court be affirmed.

STATEMENT.

This is a direct appeal from the final judgment of a three-judge district court which dismissed appellants' complaint seeking to set aside orders of the Interstate Commerce Commission. Movants were intervening defendants in the lower court.

The challenged orders of the Commission were entered in a formal complaint proceeding, I.C.C. Docket No. 30744, brought by Federal Barge Lines, Inc., and American Barge Line Company (American Commercial Barge Line Company successor), together with Arrow Transportation Company. These are certificated common carriers by water subject to part III of the Interstate Commerce Act.[1] They complained on the ground that in respect to certain movements of ex-barge grain and grain products in southeastern and southwestern territories the charges demanded and received by railroads were in excess of the compensation accepted by the same railroads when transporting all-rail grain and grain products from and to the same points. This disparity in rate treatment was alleged to constitute discrimination prohibited by sections 2 and 3(4) of the Interstate Commerce Act. 49 U.S.C. §§ 2, 3(4).[2]

The particular discrimination involved in the instant case is akin to that which this Court found unlawful in

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[1] See *Federal Barge Lines, Inc., Purchase, etc.*, 285 I.C.C. 439, 440, 448 (1953) and cases cited; *American Barge Line Company Applications*, 260 I.C.C. 783, 784, 791 (1946) and case cited; *Arrow Transp. Co. Application*, 250 I.C.C. 599 (1942) and *Tennessee Valley S. & G. Co.*, 265 I.C.C. 5 (1946), Arrow Transportation Co. having been substituted as applicant in the case last cited.

[2] J.S. at 13-14 reproduces these provisions.

Interstate Commerce Commission v. *Mechling*, 330 U.S. 567 (1947); *James McWilliams Blue Line* v. *United States*, 100 F.Supp. 66 (S.D.N.Y. 1951), *aff'd*, 342 U.S. 951 (1952) and *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956). The discrimination here was accomplished through the medium of railroad divisions[3] of through all-rail rates less than flat rates[4] assessed on ex-barge grain moving over the same railroad from and to the same points.

In its first three reports in I.C.C. Docket No. 30744[5] the Commission ruled in one form or another that unlawful or unjust discrimination does not result when a division of a through all-rail rate on grain is lower than the flat rate on ex-barge grain for a corresponding haul.[6] In *Arrow Transp. Co.* v. *United States*, 176 F.Supp. 411 (N.D. Ala. 1959), *aff'd sub nom. State Corp. Comm'n of Kansas* v. *Arrow Transp Co.*, 361 U.S. 353 (1960), this ruling of the Commission was held contrary to law, the court saying:

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[3] A division is the amount which is allotted among connecting carriers by agreement out of a single-factor, joint through rate to cover a specified portion of the through haul performed by a particular connecting line in the through route.

[4] Flat rates are published from specific origins to specific destinations and apply regardless of either prior or subsequent transportation.

[5] Docket 30744, *American Barge Line Co., et al.* v. *Alabama G. S. R. Co., et al.*, 296 I.C.C. 247 (1955), 303 I.C.C. 463 (1958), and 306 I.C.C. 167 (1959).

[6] In its third report the Commission did find that unlawful discrimination in violation of §3(4) results from a separately published rate factor (reshipping on proportional rate) on ex-rail grain when lower than a flat rate on ex-barge grain for a corresponding haul. The Commission's order requiring the railroads to cure this discrimination was sustained in *Atchison T. & S. Fe Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kan., 1961) which was not appealed.

> It is immaterial to the question of discrimination whether the compensation a carrier receives on ex-rail traffic is in the form of a separately established proportional rate, or a division of a through rate. In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination. * * * We simply hold * * * that the divisions received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements.[10] [176 F.Supp. at 419]
>
> [10]The Supreme Court in Mechling held that a showing of additional costs on ex-barge traffic was necessary to justify a differential between ex-barge and ex-rail charges. The railroads submitted cost evidence in this proceeding in an attempt to justify such a differential but the Commission rejected this evidence. See also *Tennessee Valley Authority* v. *United States* D.C.N.D. Ala. 1951, 96 F. Supp. 409. [176 F.Supp. at 419]

Upon remand, the Commission reopened Docket No. 30744 to receive (1) evidence with respect to all-rail divisions on grain and grain products received by railroads from barge unloading ports, including Memphis, Tennessee and New Orleans, Louisiana, and (2) evidence relevant to whether and to what extent such divisions should determine the rail rates from such ports on ex-barge traffic. After hearings the Commission issued its fourth report, 316 I.C.C. 759 (1962), which is a part of the orders here challenged.

In that report the Commission found that complainants had made out a *prima facie* case of discrimination which is illustrated by the following examples: From Memphis,

Tenn., to Little Rock, Ark., flat rates on ex-barge traffic of 28.5 cents on coarse grains and 37.5 cents on other grains versus divisions from and to the same points of all-rail rates which ranged from 8.6 cents to 16 cents, dependent on origin and kind of grain (316 I.C.C. at 766); from New Orleans, La., to destinations on the Texas & Pacific and Texas & New Orleans railroads, flat rates on ex-barge grain ranging from 35 to 37.5 cents versus corresponding divisions on all-rail grain ranging from 13.3 to 20.9 cents (316 I.C.C. at 767). The Commission further found that the defendant railroads had not established a cost justification for flat rates on ex-barge grain higher than the corresponding divisions on all-rail grain (316 I.C.C. at 770); that, absent a demonstrated cost differential, a rail carrier from a port is entitled to no more compensation on ex-barge traffic than it obtains on ex-rail traffic from the same origin moving from transit at the port to the same destination (316 I.C.C. at 771); that the defendants had not overcome by their evidence the *prima facie* case of discrimination illustrated by the examples given above (316 I.C.C. at 773); and that the railroads could employ any method to eliminate the discrimination found, so long as they treated ex-barge grain, as nearly as practicable "in the same manner ratewise as ex-rail grain" (316 I.C.C. 773).

The Commission's ultimate conclusions and orders proscribed unlawful discrimination "against connecting common carriers by water subject to part III" in violation of section 3(4) and also unjust discrimination in violation of section 2 against shippers whose grain and grain products reached the ports by for-hire barge transportation. (J.S. 32, 34-35).

The challenged orders became effective before this case was heard on its merits in the lower court. The railroads elected to comply with the Commission's orders by cancelling the joint rates via the ports on all-rail grain. As a result, the equality in rate treatment of ex-barge and all-rail grain required by the orders is now accomplished by applying the higher flat rates to each type of traffic.

The district court, in sustaining the Commission's order, held that the Commission had not misconstrued the governing statute and had correctly followed the construction of the law set forth in *Arrow*. (J.S. 23-24, 25-26). It further held that there is no basis, statutory or constitutional, for distinguishing between the application of the Commission's order to regulated and unregulated[7] grain. (J.S. 25.) On the question of whether the Commission's findings and orders are supported by or contrary to the evidence, the district court said:

> "A reading of the record before the Commission leads to the conclusion that the findings are supported by the record. The Court does not find error in the Commission's findings that a cost differential for transited ex-rail and ex-barge grain for reshipment from the ports was unsubstantiated." [J.S. 28]

The railroad appeal charges error in these holdings of the district court.

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[7] Grain in bulk transported by water is unregulated when moved in a tow containing not more than three bulk commodities, whether transported by a certificated or non-certificated water carrier. Section 303(b) (49 U.S.C. 903(b)).

ARGUMENT.

This motion deals only with those questions which relate to discrimination in rates and charges by railroads against connecting common carriers by water subject to part III of the Interstate Commerce Act, such discrimination being prohibited by section 3(4) of the Act. The fact that the parties to this motion are common carriers by water subject to part III gives them full protection against the discrimination prohibited by that section, even if the grain were to move in a tow exempt from regulation under section 303(b) of the Interstate Commerce Act (49 U.S.C. § 903(b)) by reason of the consist of that tow.[8] Consequently, the parties to this motion are not concerned, as are carriers by water not certificated under part III of the Interstate Commerce Act, with questions which relate to the Commission's findings and orders directed to unjust discrimination against shippers in violation of section 2.

1. *Mechling* gave recognition to the right of interstate water carriers to demand from the railroads with which they connect complete equality with connecting rail lines in the matter of rates and charges applied on shipments of bulk grain from the ports to which the water carrier traffic is brought. *Dixie* made it plain that rail carriers cannot, through the device of joint rates and lower divisions with connecting rail lines, evade their statutory obligation to give equal rate treatment to connecting water lines. *Arrow* made it clear that as to this very

[8] The record shows that the volume of total traffic transported by movants is such that, except in rare instances, their tows contain non-bulk commodities and thus do not meet the conditions of exemption in section 303(b) as construed by the Commission.

ex-barge grain traffic the Commission is obliged to find the discrimination unlawful and to require its elimination *unless* railroads bear the burden of proving that flat rates on ex-barge grain higher than divisions on all grain are justified by a difference in cost. The Commission, in obedience to the remand in *Arrow*, treated the disparity between flat rates on ex-barge grain and divisions on all-rail grain as making out a *prima facie* case of discrimination. Upon consideration of all evidence relied upon by the railroads, the Commission categorically found that *prima facie* case had not been overcome. (316 I.C.C. at 773). The district court, upon its reading of the record, agreed. (J.S. 27-28). No further consideration of these matters by this Court is warranted.

2. Appellants claim that this Court has not considered the statutory and constitutional questions involved in treating grain brought to the ports by certificated carriers in exempt tows as entitled to protection under section 3(4). (J.S. 11.) In making this claim appellants overlook that all of the traffic involved in *Mechling, Dixie Carriers,* and *Arrow* was bulk traffic of certificated carriers which moved unregulated whenever the tows in which the traffic was transported met the conditions of exemption set forth in section 303(b). In each of those cases this Court held in unqualified terms that the regulated barge lines were entitled to the protection provided by section 3(4) and in so holding made no differentiation between traffic handled in regulated and traffic handled in exempt tows. It could hardly be otherwise inasmuch as the protection from unlawful discrimination extended by the words Congress added to section 3(4) in 1940[9] runs to "any common carriers by water subject to part III." That protection is not made dependent on the traffic itself being subject to part III, so long as it is transported by a subject carrier.

[9] Sept. 18, 1940, c. 722, Title I § 5(3), 54 Stat. 904.

CONCLUSION.

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

Respectfully submitted

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Appellants

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

---

MOTION TO AFFIRM FILED ON BEHALF OF WATERWAYS BULK TRANSPORTATION COUNCIL, INC.

ALEXANDER B. HAWES
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
Counsel for Waterways Bulk Transportation Council, Inc.

January 15, 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 770

CHICAGO, ROCK ISLAND & PACIFIC R. Co., et al.,
Appellants

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

---

MOTION TO AFFIRM FILED ON BEHALF OF WATERWAYS BULK TRANSPORTATION COUNCIL, INC.

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Waterways Bulk Transportation Council, Inc., ("the Council") an intervening party before the Interstate Commerce Commission and the district court, moves that the judgment of the district court be affirmed.

STATEMENT

In 1955, a complaint was filed before the Interstate Commerce Commission charging appellants with maintaining discriminatory charges for reshipments of grain and grain products arriving at certain Mississippi River ports by barge transportation. The complaint initiating the proceedings before the Commission charged violations of Section 2 as well as Sections 3(1) and 3(4) of the Interstate Commerce Act ("the Act"), 49 U.S.C. §§ 2, 3(1) and 3(4). The Commission refused to accept evidence of the divisions of through all-rail rates which the barge lines sought to introduce as a measure of the alleged discrimination. On review, this order was vacated and the case remanded to the Commission. *Arrow Transp. Co.* v. *United States*, 176 F. Supp. 411 (1959), *aff'd per curiam, State Corp. Comm.* v. *Arrow Transp. Co.*, 361 U.S. 353 (1960).

Pursuant to the remand the Commission reopened its docket No. 30744 and received evidence of the divisions received by the appellants for reshipments of ex-rail grain. The Commission permitted the intervention and participation of the Waterways Bulk Transportation Council, Inc., an association of shippers and water carriers using and performing bulk barge transportation exempt from regulation under Section 303(b) of the Act, 49 U.S.C. § 903(b). The Commission, by its Corrected Order of January 30, 1963, (Appendix E to Jurisdictional Statement, pp. 34-35) found that:

> "rates for the rail movement . . . are and for the future will be discriminatory against connecting common carriers by water subject to Part III, *and unjustly discriminatory against shippers whose grain and grain products reach those ports by for-hire barge transportation,* to the extent

> that those rates exceed the . . . rates or . . . divisions [on like ex-rail transportation]". (Emphasis supplied.)

The Commission's Order was sustained by the court below, 233 F. Supp. 381, and the appellants have prosecuted this direct appeal to this Court.

ARGUMENT

Preliminarily, the Council points out that its interest is limited to that part of the order of the Interstate Commerce Commission, sustained by the decision of the court below, that requires the appellants to cease and desist from rate discrimination against grain arriving at the railroad shipping points on the Mississippi River by for-hire barge transportation, whether such barge transportation is regulated or exempt from regulation under Part III of the Act.

The decision of the district court is plainly correct. As pointed out in the opinion of the district court, this Court has specifically held that the prohibitions in Section 2 of the Act against carrier discrimination include discrimination, by means of rates or otherwise, directed at shippers moving their products by unregulated barge lines. (Jurisdictional Statement, p. 24.)

The "all-fours" case is *James McWilliams Blue Line, Inc.* v. *United States,* 100 F. Supp. 66 (S.D.N.Y. 1951), *aff'd per curiam,* 342 U.S. 951 (1952). There, a barge line carrying coal under the exemption for bulk barge transportation complained against railroad rate discrimination, alleging violations of Section 2, 3(1) and 3(4) of the Act. A closely divided Commission refused to entertain this complaint on the

ground that no protection was afforded by the cited Sections for unregulated barge traffic. *James McWilliams Blue Line, Inc.* v. *Campbell's Creek R.R.*, 278 I.C.C. 312 (1950). Review by the district court resulted in reversal of the order and in specific rejection of the contention, urged here, that the Commission cannot enjoin railroad rate discriminations against barge transportation conducted under the bulk exemption. The Commission and the railroads appealed the decision to this Court and argued vigorously that traffic moving by barge transportation exempted under Section 303(b) was not entitled to the protection of Section 2 of the Act.[1] However, *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), had established that Section 2 of the Act protects all shippers using for-hire barge transportation, whether regulated or unregulated,[2] and it took this Court only one sentence and one citation to reject the argument:

> Per Curiam: The motion to affirm is granted and the judgment is affirmed. *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567.

The eloquent brevity of the *Blue Line* decision underscores the pointlessness of the instant appeal. Eighteen years after the *Mechling* decision, and thirteen years after the *Blue Line* per curiam, the rail-

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[1] The analogy drawn by appellants and rejected by this Court was that unregulated barge traffic moving on the coastal waterways was entitled to the same protection as barge operations on the Yangtze River. Appellants' Jurisdictional Statement, p. 11, *Interstate Commerce Commission* v. *James McWilliams Blue Line, Inc.*

[2] In *Mechling*, this Court approved a Commission order enjoining railroad rate discriminations. The discriminations were directed against shippers using regulated and exempt barge transportation.

roads should reconcile themselves to the fact that exempt water transportation of bulk commodities is a recognized part of the national transportation system, and the shippers who choose to take advantage of its inherent cost advantages are not to have their shipping economies eroded by discriminatory charges made by the railroads.

With reference to the questions presented, as stated by the appellants in their Jurisdictional Statement, p. 3, Question 1 in effect accuses the Commission of misconstruing Section 3(4) of the Act in prescribing rates for rail transportation of grain brought to Mississippi River ports by water in unregulated barge movements. The question as stated misconstrues the Commission's order. The part of the order that involves Section 3(4) was specifically amended by the Commission's Corrected Order of January 30, 1963, (Appendix E to Jurisdictional Statement, pp. 34-35) so as to apply only to discrimination "against connecting common carriers by water subject to Part III," and thus does not apply to unregulated water carriers or to the grain carried by them. The only parts of the order that seek to end discrimination involving grain transported by all for-hire barge transportation, thus including barge transportation performed under the Section 303(b) exemption, ban discriminations against *shippers* using such transportation, and are therefore clearly based not on Section 3(4) but on Section 2 of the Act.

Appellant's Question 2 in effect asks the Court to hold that Section 2 of the Act is inapplicable because no shipper by exempt barge transportation testified to a competitive disadvantage occasioned by the discriminatory divisions. But discrimination prima facie

exists to the extent that the railroad rate division applicable to an ex-rail movement is lower than the railroad rate charged on a like ex-barge movement. *Arrow Transp. Co.* v. *United States,* 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam, State Corp. Comm.* v. *Arrow Transp. Co.*, 361 U.S. 353 (1960); *accord, Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567 (1947). These cases establish that an outbound carrier cannot legally exact compensation on ex-barge shipments that exceeds the compensation accepted on like movements of ex-rail shipments. Appellants' tariffs discriminated against all ex-barge grain and made no distinction between grain arriving by regulated and grain arriving by unregulated water transportation. The remedy fashioned by the Commission to protect shippers using for-hire barges was properly as broad as the discrimination found. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473-75 (1952); DAVIS, ADMINISTRATIVE LAW TREATISE, Sec. 8.19 (1958). In the *Ruberoid* case, this Court said (at p. 473):

> "Orders of the . . . Commission are . . . intended . . . to prevent illegal practices in the future. In carrying out this function, the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal . . . . [W]e have said that 'the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.' [*Jacob Siegel Co.* v. *Federal Trade Commission*], 327 U.S. at 613."

Appellant's Question 3 asks the Court to find an unconstitutional deprivation of due process in the Commission's order. Without benefit of citation of precedent or reasons of policy, this Court is told that the Commission's interpretation of the Act unfairly handicaps regulated carriers in their competition with unregulated carriers, and is therefore a violation of due process. (Jurisdictional Statement, p. 8.) The contention ignores respected authority to the contrary. The fact that a "member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier" to regulation. *Bowles* v. *Willingham*, 321 U.S. 503, 518 (1944). There is no violation of due process when, in the words of the court below:

> the railroads . . . are free to set the division or rates charged on ex-barge and ex-rail reshipments at a compensatory level. (Jurisdictional Statement, p. 25.)

The exemption for bulk water carriage, premised on a clear Congressional finding that there is no effective cost competition between the railroads and the barges carrying bulk commodities, has been applied for 24 years. It is too late to contend that Congress had no reasonable basis for granting an exemption from regulation, subject to certain expressed limitations, to barges carrying bulk commodities. The alleged constitutional infirmities in the Commission's order were not apparent to this Court on the prior occasions when it applied Section 2 to rate discriminations against shippers using exempt as well as regulated for-hire barge transportation. *Interstate Commerce Commission* v. *Mechling, supra; James McWilliams Blue Line* v. *United States, supra.* Serious and substantial con-

stitutional questions are not presented merely because an appellant says they are.

CONCLUSION

Appellants present no substantial question for the decision of this Court. The judgment and decree of the district court should be affirmed.

Respectfully submitted,

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Counsel for Waterways Bulk Transportation Council, Inc.

January 15, 1965

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing Motion to Affirm was mailed, postage prepaid, to each of the parties of record herein.

Dated, January 15, 1965.

s/ ALEXANDER B. HAWES
Alexander B. Hawes

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 770

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI—EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court.[1] The action sought to set aside a report and order of the Interstate Commerce Commission[2] which had been entered pursuant to the

[1] 28 U.S.C. 2284, 2325.

[2] *American Barge Line Company, et al.* v. *Alabama Great Southern Railroad Company, et al.*, Docket No. 30744, 316 I.C.C. 759 (1962).

remand decree in *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411 (N.D. Ala.), affirmed *per curiam sub nom. State Corporation Commission of Kansas* v. *Arrow Transportation Co.,* 361 U.S. 353. The three-judge court dismissed the action on the merits, thus permitting the Commission's report and order to stand.[3]

Arrow was a challenge under the Interstate Commerce Act to a practice by which railroads allegedly charged higher rates for shipping grain out of a port when it had entered the port by barge (so-called "ex-barge grain") than when it had entered by rail (so-called "ex-rail grain"). The three-judge court in *Arrow* held "that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement and that the divisions [the share of a through rate received by a participating carrier] received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements." 176 F. Supp. 411, 419. The case was remanded to the Commission "to enter an order prescribing lawful, reasonable, and nondiscriminatory rates on ex-barge traffic from the Tennessee River ports to destinations in the Southeast in conformity with this opinion." *Id.* at 421.

In the present proceeding, following remand the Commission received evidence of the railroads' divisions of through all-rail rates. This evidence established that appellants' charges for shipping ex-barge

[3] The opinion of the court below is reported at 233 F. Supp. 381. See J.S. 16–29.

grain and grain products from certain river ports to inland destinations are significantly higher than the amounts they receive under the applicable divisions of the established through all-rail rates.[4] 316 I.C.C. 759. The Commission ruled that, in the absence of cost justifications, these differentials would, under *Arrow,* constitute discrimination against connecting water carriers and shippers in violation of Sections 3(4) and 2 of the Interstate Commerce Act, 49 U.S.C. 3(4), 2 (316 I.C.C. 772, 774). It found that appellants had not shown any cost-justification for the differentials.

The Commission's order (J.S. 34–35) directed elimination of discrimination where ex-barge rates exceed either the present rail rates or the lowest divisions received by the railroads on joint all-rail rates for the same transportation. The three-judge district court unanimously affirmed the Commission's report and order.

ARGUMENT

The Commission's order, unanimously affirmed by the district court, complies with the direction of the *Arrow* decision to eliminate discrimination in the pricing of railroad services so as to preserve to water carriers and shippers using water carriers the inherent advantages of such transportation.[5] Appellants do not

[4] For example, to destinations to which the ex-barge rate from New Orleans is 35 cents, appellant The Texas and Pacific Railway Company's divisions of the through all-rail rates are 13.3, 17.8, and 19.8 cents, dependent on the commodity and point of origin (see 316 I.C.C. 759, at 766–77).

[5] The cases relied upon by the Commission and the district court as establishing discrimination here are *Interstate Com-*

deny that such discrimination exists here if their rate differentials are not cost justified. The objections which appellants do raise to the Commission's order are insubstantial and this appeal therefore presents no question warranting plenary consideration by this Court.

1. Appellants contend primarily that Section 3(4) of the Interstate Commerce Act (49 U.S.C. 3(4)) precludes the Commission from entering an order prohibiting discrimination against barge traffic carrying bulk shipments of grain and grain products. This argument is based upon the facts that Section 3(4) proscribes rate discrimination only against "connecting lines," and that the term "connecting line" is defined as including "any common carrier by water subject to part III." Noting that water carriers carrying bulk quantities of grain and grain products are exempt from economic regulation under Part III of the Act by Section 303 (b), (c) (49 U.S.C. 903 (b), (c)), appellants argue (J.S. 5–6, 11) that the Commission was therefore wrong in this case to find discrimination against "exempt" barge traffic carrying bulk grain.

Appellants' argument ignores the fact that, insofar as the Commission's order finds discrimination against *barge carriers*, it explicitly finds it only "against connecting common carriers by water subject to Part

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merce Commission v. *Mechling*, 330 U.S. 567; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66 (S.D.N.Y.), affirmed *per curiam*, 342 U.S. 951; and *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N.D. Ala.), affirmed *per curiam*, 361 U.S. 353.

III" (J.S. 34). Thus the Commission's order fully respects any limitations contained in Section 3(4). It is true that the Commission's order goes further and finds discrimination "against shippers whose grain and grain products reach those ports by for-hire barge transportation * * *" regardless of whether such barge transportation is subject to Part III of the Act (J.S. 34–35). This aspect of the order, however, flows not from Section 3(4) of the Act but from Section 2 (49 U.S.C. 2) which prohibits appellants from discriminating between *shippers* while performing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *." If shipper discrimination existed, Section 2 therefore justified an order prohibiting the discrimination even where the barges used were not subject to Part III of the Act.

2. Appellants' argument that the finding of the Commission of a Section 2 violation is not supported by substantial evidence ignores the holding of the court below that "[a] reading of the record before the Commission leads to the conclusion that the findings are supported by the record" and that "[t]here is a rational basis for the Commission's conclusion" (J.S. 28). The fact that no additional shipper testimony was adduced by the Commission following the remand in the *Arrow* case is immaterial. At various stages of this lengthy proceeding, representatives of shipper interests intervened and produced evidence concerning the impact of the grain rate structure upon

shippers and consumers.' This evidence, adduced in the same docket, was available to the Commission when it made its findings in the present phase of the case. In any event, shipper testimony was not needed to conclude that discrimination resulted under *Arrow* when railroads received from shippers similarly situated substantially different charges for the same transportation services.

3. Nor is there merit in appellants' argument that the use of divisions of joint all-rail rates as the measurement of discrimination against ex-barge grain would result in a denial of due process to the railroads and amount to an unconstitutional application of the Interstate Commerce Act (see J.S. 3, 8–9, 11). As the Commission made clear (316 I.C.C. at 773), its order does not prescribe the method of removing the discrimination found to exist. The railroads are free to establish rates at a compensatory level so long as the compensation actually received for the outbound rail movement of ex-barge grain is, at least in the absence of cost differences, no more than that received for the same movement of ex-rail grain. In sustaining the Commission's conclusion, the court below emphasized the freedom of the railroads to set their divisions or the rates charged on ex-barge and ex-rail shipments at a compensatory, non-discriminatory level (J.S. 25, 26).

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[1] Part of the history of this case, dating back to January 4, 1951, when a number of barge lines and representatives of shipper and consumer interests filed a complaint attacking the grain rate structure at certain Mississippi and Tennessee river ports, is described in the *Arrow* case, *supra*. See also *Atchison, T. & S.F. Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kans.).

The other aspect of this argument that the Commission has set rates at a non-compensatory level is based upon appellants' contention, rejected by both the Commission and the court below, that there are substantial additional cost factors in handling ex-barge grain not present in the case of ex-rail grain (see, *e.g.*, J.S. 9–10, 11). The Commission's factual determination (316 I.C.C. at 773) that the railroads "have not overcome by their [cost] evidence the *prima facie* case of discrimination * * *" was specifically affirmed by the court below, which noted that the railroads' evidence on cost differences was entirely speculative (J.S. 27–28).

CONCLUSION

No substantial question warranting plenary consideration is presented and the judgment below should be affirmed.

Respectfully submitted.

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No. 770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI — EASTERN DIVISION

BRIEF OF WESTERN RAILROADS, APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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STATEMENT

Appellants, western railroads, pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, file this Brief In Opposition to Motions to Affirm filed by the United States and the Interstate Commerce Commission, Federal Barge Lines, Inc. and American Commercial Barge Lines Co., and Waterways Bulk Transportation Council, Inc.

ARGUMENT

Question 1, page 3 of appellants' Jurisdictional Statement, is challenged on page 5 of the Waterways Bulk

Transportation Council's Motion to Affirm, however, the significance of the first Question Presented is made clear by the Argument of Federal and American Barge Lines that they are entitled to the benefits of Section 3(4) of the Interstate Commerce Act when bulk grain is hauled by them in unregulated tows pursuant to the exemption in Section 303(b) of the Act. The western railroads contend that said barge lines are not subject to Part III of the Act when engaged in unregulated service under Section 303(b), and that the Section 3(4) finding is confined to regulated barge traffic.

Federal and American assert that *Mechling, Dixie Carriers,* and *Arrow* cases[1] involved unregulated traffic, but that fact, if it is a fact, was not established on the record in this case, and no confirmation is revealed by a careful reading of those cases. It must be concluded that the Supreme Court has never considered the statutory construction problem posited herein.

Section 2 of the Interstate Commerce Act was utilized by the Commission to circumvent the express limitations of Section 3(4). Waterways Bulk Transportation Council, Inc. contends that the Section 2 finding complies with an all-fours case, *James McWilliams Blue Line* v. *U.S.*, 100 F.Supp. 66. Actually, the *Blue Line* case stands for the principle that a Section 2 violation cannot be justified by the fact that the injured shipper, subsequent to the completion of the through movement by railroad thence coastal water service, reshipped by unregulated barge. It does not stand for the extreme proposition that no evidence of unjust discrimination against a shipper is necessary to support a Section 2 violation finding if there is a possibility

1. *I.C.C.* v. *Mechling,* 330 U.S. 567; *Dixie Carriers* v. *U.S.*, 351 U.S. 56; *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411.

of a prior unregulated movement by a for-hire water carrier.

In the *Blue Line* case, there was probative evidence of unjust discrimination against a shipper on the record. In the case at bar there is no such evidence. In *Automobiles From Atlanta, Ga., to Norfolk, Va.*, 316 I.C.C. 99, Division 2 of the Commission said that "in every case of unjust discrimination there must exist an aggrieved party, there must be at least one shipper." More recently in *Natural Gas Pipeline Co. of America* v. *N.Y.C. R. Co.*, 323 I.C.C. 75, 80, the entire Commission stated:

> "* * * allegations of unlawfulness under section 2 must be supported by substantial evidence. *Coal from Ill., Ind., and Ky. to Illinois and Indiana*, 308 I.C.C. 673, 678. A finding of unjust discrimination, under the criteria of the statute, may not rest upon mere speculation. Here, there is no evidence that any specific shipper or receiver, in single cars or otherwise, at origin or destination, or at points grouped therewith, has any objection to the assailed rates. Nor is there any room for an inference or presumption of unjust discrimination."

The Commission's Section 2 violation finding in the instant case, 316 I.C.C. 759, 774, is based on pure speculation. Compare *New York Central Railroad Co.* v. *United States*, 207 F.Supp. 483, 490, where an order of the Commission under Section 3 of the Act was held to have failed for "want of adequate supporting findings".

The Government on page 5 of its Motion To Affirm, poses a hypothetical—"If shipper discrimination existed", the Commission's order is justified under Section 2. After acknowledging that there was no testimony at the further hearing that any division resulted in unjust discrimination, it is explained that shippers had intervened in the pro-

ceeding, at the hearings prior to the further hearing, "and produced evidence concerning the impact of the grain rate structure upon shippers and consumers." However, the grain rate structure is based on Section 3(1) of the Act, and at page 771 of 316 I.C.C. 759, the Commission said that it was compelled to reject arguments that the "relief sought by the bargelines would destroy the traditional grain rate structure". Moreover, in the first report of the Commission after the part of the record referred to was closed, it was found that "no evidence was submitted by anyone which would support a finding to show a violation of section 2 of the act". 296 I.C.C. 247, 249. The Commission said nothing of shipper testimony in its reports so it could not have been the basis for its finding. See *Pennsylvania R. Co.* v. *United States,* 216 F.Supp. 199, 202.

There is no evidence on the record that "railroads received from shippers similarly situated substantially different charges for the same transportation service". See page 6 of the Government's Motion to Affirm. Therefore shipper testimony was necessary. Furthermore, in the Court below, no citations to the record were made on brief or in oral argument to testimony or exhibits which would sustain the quoted conclusion. The Commission's conclusion that unjust discrimination against shippers exists is in the abstract, and no place in the report is it made concrete by discussion of specific or general disadvantage to any shipper. A conclusion that Section 2 of the Act has been violated must flow from several subsidiary findings, including a finding based on evidence of record that unjust discrimination is practiced in the transportation of like traffic under "substantially similar circumstances and conditions". Compare *Cincinnati, New Orleans and Texas Pac. Ry. Co.* v. *United States,* 229 F.Supp. 572 (S.D. Ohio 1964).

Waterways Bulk Transportation Council, Inc. on pages 5 and 6 of its Motion to Affirm cites the *Arrow* case for the untenable position that under Section 2 of the Act, "discrimination" (unjust?) "prima facie exists to the extent that" a division received for an ex-rail movement is lower than an ex-barge rate, however, when the Court in that case held that the division of an outbound railroad is "*prima facie* evidence as to what charge should be assessed upon ex-barge movements" it was resolving the Section 3(4) issue. 176 F.Supp. 411, 418 and 419. In its consideration of Section 2 of the Act, unjust discrimination between shippers, the Court, page 421, confined its comparison to "higher rates" than ex-rail rates. Therefore, the *Arrow* case provides no authority for a finding that ex-barge rates higher than the lowest divisions of joint rail rates violate Section 2 of the Act.

On the record the Commission should have found that divisions of joint rail rates are not shown to be unjustly discriminatory against any shippers. In *L. & N. R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234, the Supreme Court said:

> "The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole."

Accordingly, it must be concluded that such a division cannot cause unjust discrimination against a shipper.

Inasmuch as no shippers on the record claimed to be injured by divisions of joint rail rates, the Commission's Section 2 finding encourages and promotes unregulated and psuedo private carriage. As to the latter, a large grain shipper who can afford to ship in barge-load quantities can, if it has not already done so, organize a separate water-carrier corporation, which can hold-out to transport bulk commodities for others, even though it may never be called

upon to do so, and under the Commission's Section 2 finding, it would be called a "for-hire" carrier so that its *alter ego*, the large grain shipper, would be entitled to rail rates on a parity with the lowest divisions of joint rail rates. To compel regulated railroads to establish rates that promote expansion of unregulated and private carriage can only lead to the further decline of the regulated common-carrier industry with concurrent reductions in service and contractions in plant to the detriment of small shippers thereby hampering commercial competition. The result is inconsistent with the objectives of the National Transportation Policy. Contrast the following comment of the entire Commission in *Motor Transp. of Property Incidental to Air*, 95 M.C.C. 71, 86:

> "• • • the national transportation policy, which requires that we recognize and preserve the inherent advantages of each mode of transportation subject to our regulation. We would not be complying with the congressional mandate were we to adopt, in the absence of a clear legislative directive, a regulation which would greatly increase the scope of exempt transportation at the expense of those motor carriers which are subject to the economic regulation of the Interstate Commerce Act."

And in *Grain To, From, And Within Southern Territory*, 259 I.C.C. 629, 665, it was observed "that the rates of two competing carriers could not be regulated fairly in the absence of" the Commission's "regulation of both carriers".

On page 6 of the U. S. and I.C.C. Motion to Affirm, the attempt to meet the constitutional issue reveals a misunderstanding of the railroads' contention. Western railroads operate all-rail routes in direct competition with unregulated motor-water-motor routes for available grain traffic from the considered production origins to Arkansas and Louisiana. For example, the Chicago, Rock Island and

Pacific R. Co. single-line routes from Illinois and Iowa corn country and wheat farms in Kansas to those destination States are in addition to joint line all-rail routes, which, among others, embrace the CRI&P to Chicago, Peoria, St. Louis, Omaha or Kansas City, thence Illinois Central R. Co. or Frisco to Memphis and CRI&P beyond. There can be no doubt that the effect of the Commission's order is to compel a rail rate adjustment from Memphis that will implement movement of grain to Memphis by unregulated carriers, and thereby divert from the CRI&P either its substantial hauls from country origins to those midwestern gateways, or CRI&P (single-line) long hauls to destinations. It is submitted that regulation of short-haul rail rates in a way that fosters transportation by unregulated carriers deprives regulated carriers, including the appellant railroads, of due process of law.

Bowles v. *Willingham*, 321 U.S. 503, 518, cited by Waterways Bulk Transportation Council, Inc., is readily distinguishable. The western railroads do not claim in this case that rate regulation of railroads and not of exempt water carriers is *per se* unconstitutional, although the President in his message to Congress recommended greater reliance on competition in transportation, and his predecessor advocated extension of the bulk commodities and agricultural products exemptions to the railroads. The crux of the western railroads' contention is that regulation of rail rates solely to promote the flow of traffic in unregulated channels, by diversion from regulated carriers, is unfair and violates the Fifth Amendment. The practical exercise of the police power by the Congress in wartime to control prices and rents had no such destructive objective.

It was not alleged, as inferred by the Government, that the order was unconstitutional because it required establishment of noncompensatory rail rates, although it was

pointed out that certain so-called alternative methods of compliance offered by the Commission's report were illusory, because first, if the ex-barge rates were published on a parity with the lowest divisions on the record, the cost evidence disclosed that such ex-barge rates would not be compensatory, particularly in view of the additional origination costs incurred in handling ex-barge traffic as compared with ex-rail, and second, if the outbound railroads' divisions were raised to a level that would be compensatory for handling ex-barge grain, including the necessary origin service costs, the divisions received by the inbound carriers would shrink automatically to noncompensatory levels. In regard to the latter, it must be kept in mind that the inbound carriers at Memphis and New Orleans absorb the full cost of providing transit service. Thus the inbound division must cover the cost of rail service to and from a transit facility. The third and last alternative was cancellation of the competitive joint all-rail rates with interchange between railroads at Memphis and New Orleans, an alternative which, if constitutional, is certainly not consistent with the National Transportation Policy.

Failure of the Commission to consider evidence of additional costs of handling ex-barge grain violates Section 8 of the Administrative Procedure Act. See page 7 of the Government's Motion to Affirm. Since rail movement studies revealed no ex-barge movements,[2] and there is no shipper evidence of movement, cost evidence could not be developed by time studies and observation of actual ex-barge rail movements to Arkansas and Louisiana. For such hypothetical shipments, use of the average cost studies prepared by the Commission's Cost Finding Section provided

2. For the short hauls involved it is conceded that motor carriers have an inherent low-cost advantage over western railroads in transporting ex-barge grain, whereas rail carriers have an inherent cost advantage on long hauls.

the most appropriate method of cost determination. In fact the I.C.C. relies upon these studies for disposition of almost all competitive rate cases, although modifications based on actual studies of particular cost elements are accepted. These average-cost studies are comprised of a logical compilation of all cost elements.

Exhibits in evidence show separately the cost elements applicable to ex-barge rail origination service, which origin service is not necessary and would not be performed by an outbound rail carrier on an ex-rail shipment received from another railroad for movement from Memphis to Arkansas or New Orleans to Louisiana. At page 770 of 316 I.C.C. 759, the Commission admits that considerable cost evidence was submitted. Then one cost element "among other things" is described and rejected in a perfunctory way as "inconclusive". There is no discussion of the other cost elements ("other things"), but it is concluded that the costs of handling ex-barge grain are not shown to be substantially greater than the cost of handling ex-rail grain from the same points. The words "substantially greater" are ambiguous and comparison from the same points is improper and contrary to probative evidence on the record. Divisions received by outbound rail carriers cover service from their yards where the inbound carriers deliver the ex-rail carloads. In connection with an ex-barge rate, these outbound railroads must provide or absorb the cost of a full origination service from the barge unloading dock. If the division is the measuring rod then the service provided to earn the division must be a yardstick, and obviously the cost of origination service must be added to the outbound division to obtain an equitable standard for determination of a nondiscriminatory ex-barge rate.

The burden or handicap cast upon the western rail carriers by this decision is probably premised upon the ap-

parently unintended handicap imposed by the *Mechling* case on the title complainant and other western railroads in the transportation of Illinois corn to Chicago. No attorney for the western railroads was before the Supreme Court in the *Mechling* case. Eastern railroads had accorded Chicago-to-east proportional grain rates voluntarily to ex-Lake spring wheat from the top of the Lakes, the same as applied on ex-rail spring and winter wheat, corn and other grains, but the ex-rail proportionals were subject to observance of the flat rate from Chicago as a minimum. Thus if the inbound rail rate on corn from the productive territory adjacent to the Illinois River was less than the difference between the outbound flat and proportional rates from Chicago to the same eastern destination, the eastern railroad would "pad" or increase the proportional rate so that the inbound and outbound rail rate combination would be equal to the flat rate. In the *Mechling* case, the ex-barge corn traffic was accorded unpadded proportional rates and the long-and-short-haul clause of the 4th Section was held not to be a bar. This situation has deprived the CRI&P from competing on a fair basis with barges from a large productive territory. Establishment of competitive western rail rates are a nullity because shippers know that on this ex-rail billing the outbound rail proportionals will have to be padded. Thus there is an embargo on rail corn from stations on CRI&P along the Illinois River from Peoria to Joliet.

Destruction of rail competition in this way is contrary to the 4th Section of the Interstate Commerce Act, but the *Mechling* case holds that the barge lines must be accorded this advantage, although a conventional "special case" required by Section 4 as a basis for relief could not be established because there is no competitive necessity for application to ex-barge corn from Illinois River loading termi-

nals to Chicago of Chicago-to-the-east rail rates less than the "padded" proportional rail rates applicable on ex-rail grain from the same respective origins.

This is not a proper proceeding for modification of inequities stemming from the *Mechling* decision, and no corrective action is proposed herein, but imposition of such handicaps in intermodal competition is now unlawful. *I.C.C.* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744, 758. Prescription of ex-barge rates no higher than the lowest divisions of outbound railroads from Memphis and New Orleans to Arkansas and Louisiana imposes a handicap on the all-rail joint routes via those gateways. Construction of rail rates applicable to the final segment of compelled motor-barge-rail routes, without any allowance for the rail origination service required of outbound railroads on ex-barge grain from Memphis and New Orleans to Arkansas and Louisiana, but not required on corresponding ex-rail shipments, handicaps the all-rail routes, and indirectly results in involuntary subsidization by outbound railroads of the competitive water routes.

Adverse effects on western railroads are compounded by the fact that the handicap imposed by the Commission's order is purportedly derived or deduced from Section 3(4) which is confined to regulated traffic, nevertheless it is extended to unregulated water traffic by adoption of the Section 2 finding without any supporting evidence. In the last analysis, the Section 2 finding is supported only by citation of cases, which under any reasonable interpretation do not justify the pertinent finding. The Commission's ultimate findings and conclusions should have been held to be unsupported by adequate subsidiary findings and reasons for the conclusions. See *Nashua Motor Express, Inc.* v. *United States*, 230 F.Supp. 646, 650 [4].

Federal Trade Commission v. *Rubberoid Co.*, 343 U.S. 470, cited by Waterways Bulk Transportation Council, Inc., reviews the scope of an F.T.C. order. Contrary to the case at bar, the findings of price discrimination by Rubberoid were supported by evidence.

CONCLUSION

The record before I.C.C. is extensive, but a small portion is pertinent to issues raised herein. In fact on the Section 2 issue, the western railroads would make no record reference because they know of no supporting evidence, thus rebuttal evidence was not necessary. The questions raised are largely questions of law and application of the law to relatively simple factual situations. If jurisdiction were granted, western railroads would make record reference to less than 75 pages of transcript and 15 exhibits, consisting of: cost evidence, primarily concerning terminal costs at Memphis and New Orleans; testimony to show that the outbound railroads earn their divisions for service from their respective terminal yards and do not absorb any part of the inbound carriers' switching costs for movement from transit facilities to the outbound railroads' yards; summaries of movement studies; applicable divisions; and testimony revealing that complainant barge lines make movements exempt under Section 303(b), to controvert the footnote representation on page 7 of Federal's Motion to Affirm. The Railroads' brief would be less than 50 printed pages. Very few record references were made by the Government and the barge lines in the District Court below. Under Section 10(e) of the Administrative Procedure Act, review of the portions of the record cited by the parties is sufficient. Therefore, resolution of the important legal questions presented would not impose a workload on the Supreme Court that the size of the record might otherwise imply.

Inequities flowing from the Commission's lean-over-backwards misapplication of principles enunciated in *Mechling* and *Arrow* cases, can only impede utilitarian and economical co-ordination of regulated transportation facilities. Rail-rate legislation is a continuing process based on changing shipper and market requirements. Shippers' applications for establishment of joint rates to move prospective traffic in volume and with regularity cannot be given proper consideration when the Commission's order requires the outbound railroad from barge unloading ports to tack on a free origination service on ex-barge traffic. Action by the Supreme Court is essential to bring about equality of treatment so that grain and grain products will flow freely in interstate commerce.

For the foregoing reasons, the appellant railroads request denial of the Motions to Affirm.

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